TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED JUNE 11, 1914.

(24,268)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1915.

a UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit Begun and Held at the Court House, in the City of Richmond, on the First Tuesday in May, Being the Fifth Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

Hon. Martin A. Knapp, Circuit Judge.
Hon. Charles A. Woods, Circuit Judge.
Hon. Alston G. Dayton, District Judge.

Among other were the following proceedings, to-wit:

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-Defendant in Error,

versus

UNITED STATES to Use of J. A. PEELER et al., Trading as Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company; E. J. Erbelding, and Holley & Dyches, Defendants in Error and Cross-Plaintiffs in Error.

On Cross-writs of Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia.

Be it remembered that heretofore, to-wit: on January 9, 1914, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

1 *Transcript of Record.*

Filed Jan. 19, 1914.

THE UNITED STATES OF AMERICA,
Eastern District of South Carolina, To wit:

In the District Court.

At a District Court of the United States for the Eastern District of South Carolina, Begun and Held at the Court-house in the City of Columbia, S. C., on the First Tuesday of November, Being the 4th Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present: The Honorable Henry A. M. Smith, District Judge for the District of South Carolina.

Among other, were the following proceedings, to-wit:

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, and B. F. Holley and H. P. Dyches, the Last Two Named being Copartners, Doing Business under the Name of Holley & Dyches, Intervenors,

versus

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Complaint Filed March 4, 1913. Summons filed March 4, 1913. (Set out in bill of exceptions following.)

2 *Bill of Exceptions.*

Filed Dec. 10, 1913.

IN THE UNITED STATES OF AMERICA,
Fourth Circuit. District of South Carolina:

In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, and B. F. Holley and H. P. Dyches, the Last Two Named being Copartners, Doing Business under the Name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Be it remembered, that the above entitled action was commenced by the filing of the following summons and complaint in the office of the clerk of the United States District Court of the United States for the District of South Carolina, in Charleston, S. C., and the service thereof on the defendant, Illinois Surety Company, on the 6th day of March, 1913. The said original summons and complaint being in form as follows:

3 *Summons.*

Filed March 4, 1913.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the District Court.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Jr., Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Summons for Relief (Complaint Served).

To Ambrose B. Stannard and Illinois Surety Company, defendants in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscriber at his office, in Salisbury, N. C., on or before the rule day, occurring twenty days next after the service of this summons on you, exclusive of the day of service.

If you fail to answer the complaint within the time aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness, the Honorable Henry A. M. Smith, United States Judge for South Carolina, at Charleston, S. C., the 4th day of March, Anno Domini one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the sovereignty and independence of the United States of America.

JOHN L. RENDLEMAN,
Plaintiff's Attorney.

[OFFICIAL SEAL.]

RICHARD W. HUTSON,
C. D. C. U. S., Dist. S. C.

4 *Complaint.*

Filed March 4, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

The plaintiffs complain of the defendants and allege:

1st.

That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, at all times hereinafter mentioned and are now residents and citizens of the State of North Carolina, of the western district of North Carolina, and reside near Salisbury, Rowan county, in said district and in said State of North Carolina.

2nd.

That at the times hereinafter mentioned the Carolina Electrical Company was a corporation, organized and existing under the laws of the State of North Carolina, and that on the 4th day of October 1912, Joseph B. Cheshire, Jr., was appointed receiver of said corporation.

3rd.

That the defendant, Ambrose B. Stannard, at the times hereinafter mentioned and is now a resident of the State of New York, of the southern district of New York, and resides and has his principal place of business in the city of New York, said State.

5 4th.

That the defendant, the Illinois Surety Company, is a corporation duly organized to do an insurance and bonding business.

5th.

That on the 5th day of July, 1910, Ambrose B. Stannard entered into a written contract with one A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, for and in behalf of the United States of America, for the construction of a U. S. post-office building at Aiken, S. C., for the agreed compensation of $45,-

618.00. That, among other things, it was stipulated in the contract that Ambrose B. Stannard "furnish all of the labor and materials and do and perform all the work required for the construction, complete, of the post-office, at Aiken, South Carolina," the work to be completed by August 1st, 1911.

6th.

That the United States required of the defendant, Ambrose B. Stannard, a bond, which was executed by the defendant, the Illinois Surety Company, as surety, on the 7th day of July, 1910, in the penal sum of twenty-three thousand dollars, to be paid unto the United States of America, which bond contained the condition: "Now, if the said Ambrose B. Stannard shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in or additions to or omissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by him to be performed in any and all such changes in or additions thereto, notice thereof to the said surety being hereby waived, and shall promptly make payment to all persons supplying labor *of* materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."

7th.

That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A.
6 Peeler, partners, trading under the firm name of Faith Granite Company, entered into a contract with the said Ambrose B. Stannard to supply him with certain material to be used in the prosecution of the work provided for in such contract, and that afterwards the said Faith Granite Company entered upon the performance of the contract, and in due performance thereof, between the 20th day of September, 1910, and the 24th day of August, 1911, the said Faith Granite Company, at the special instance and request of the said Ambrose B. Stannard, furnished, supplied and delivered to the said Ambrose B. Stannard certain cut granite work, as provided for and in accordance with the plans and specifications furnished for the work by James Knox Taylor, supervising architect for the United States, which said cut granite work was used in the construction of said post-office building, and for which said cut granite work the said Ambrose B. Stannard promised to pay the sum of thirty-eight hundred and twenty-nine and 65/100 dollars, less the freight charges, which amounted to the sum of $482.25.

8th.

That the defendant, Ambrose B. Stannard, has paid no part of said account, except the freight charges of $482.25, and that there is

now unpaid and due on said account the sum of thirty-three hundred and forty-six and 80/100 dollars, with interest thereon from June 24th, 1911.

9th.

That the said Ambrose B. Stannard has made repeated promises from time to time to pay his said account; that he offered on May 17th, 1912, to give his note for 60 days, with interest at six per cent, which said offer was not accepted; that notwithstanding the oft and repeated promises of the said defendant to pay, he has failed and refused to make settlement, and no part of said account has been paid except the freight charges as stated.

10th.

That on the 16th day of January, 1911, the Carolina Electrical Company, of the city of Raleigh, N. C entered into a written
7 contract with the said Ambrose B. Stannard for certain portions of the work, to-wit: to furnish all the material and labor required under said contract to do all of the work specified under the heading "Conduit and Wiring System," page 36 of the specifications of said contract, to the heading "Approaches," and the wiring of the exterior lamp standards, all in accordance with the plan and requirements of said contract and the samples, brands, fixtures, appliances, etc., required and approved by the supervising architect for use under said contract; that the said Carolina Electrical Company faithfully complied with the terms of the said contract and furnished the said labor and materials required therefor; that the said Ambrose B. Stannard promised to pay the said Carolina Electrical Company, including extra order, amounting to the sum of twenty-five dollars, for the said labor and material, the sum of eight hundred dollars, upon which account has been paid the sum of three hundred and one and 31/100 dollars, leaving unpaid the sum of four hundred and ninety-eight and 69/100 dollars, with interest thereon from January 1st, 1912, at the rate of six per cent per annum.

11th.

That on the 16th day of November, 1912, plaintiffs made the affidavit required by the statute, and procured from the assistant secretary of the Treasury certified copies of the original contract and bonds.

12th.

That Ambrose B. Stannard and the United States accepted from the Faith Granite Company the materials furnished as aforesaid, and the said Ambrose B. Stannard and the United States also accepted the labor and materials furnished by the said Carolina Electrical Company, said work and labor being performed and done and said materials furnished by the said plaintiffs in the necessary prosecution of the work required by the original contract.

13th.

That on or about the 1st day of March, 1913, the claim of Carolina Electrical Company against the said Ambrose B. Stannard for work, labor and materials furnished, amounting to the said sum of
8 $498.69, was assigned and transferred for value to the plaintiff Electrical Engineering & Contracting Company by the said Joseph B. Cheshire, receiver of Carolina Electrical Company, and the said Electrical Engineering & Contracting Company is now the sole owner of said account, and succeeds to all the rights incident to said account heretofore belonging to the said Carolina Electrical Company; that said Electrical Engineering and Contracting Company is a corporation organized and existing under the laws of the State of North Carolina.

Wherefore, the plaintiffs, Faith Granite Company, demands judgment that they recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of thirty-three hundred forty-six and 80/100 dollars with interest from June 24th, 1911; and the plaintiff, Electrical Engineering and Contracting Company, demands judgment that it recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of four hundred and ninety-eight and 69/100 dollars, with interest from January 1st, 1912, until paid.

2nd.

For the costs of the action.

3rd.

For such other and further relief to which the plaintiffs may be entitled.

JOHN L. RENDLEMAN,
Attorney for Plaintiffs.

In response to this summons and complaint each of the defendants appeared by W. H. Townsend, Esq., their attorney of record, on the 4th day of April, 1913, and filed and served separate answers. Thereupon, on April 5th, 1913, the attorneys for the plaintiffs and defendants united in a letter to the clerk of court, of which the following is a copy:

9 "COLUMBIA, S. C., April 5th, 1913.

R. W. Hutson, Esq., Clerk U. S. District Court, Charleston, S. C.

DEAR SIR: In re U. S. to the use & benefit of Peeler et al. v. A. B. Stannard et al.

The defendants have served on the plaintiff's attorney copies of their answers in above case, filed in your office on April 4th, 1913; the undersigned counsel ask that the cause be placed on Calendar One, for trial of issues of fact, raised by said answers; and assigned to be called for trial at the next ensuing regular term of the United

States District Court to be held in Columbia, South Carolina. Please ask the judge to so assign it.

Yours respectfully,

JOHN L. RENDLEMAN,
D. W. ROBINSON,
Plaintiffs' Attorneys.
W. H. TOWNSEND,
Defendants' Attorney."

10 Thereafter, on the 26th day of April, 1913, E. J. Erbelding filed the following petition of intervention in said action, to-wit:

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignees of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now comes E. J. Erbelding, of Augusta, Georgia, and files this his intervention in the above stated cause in pursuance to a notice served upon him on the 8th day of March, 1913, signed by John L. Rendleman, attorney-at-law for the above named plaintiffs, and respectfully shows:

1st. That your intervenor, E. J. Erbelding, entered into a contract with said Ambrose B. Stannard, on the 11th day of February, 1911, "to furnish and install all labor and materials for the plumbing, heating and gas fitting," as per plans and specifications for the new post-office building recently erected at Aiken, S. C., a copy of which contract is hereto attached, marked "Exhibit A," and made a part hereof; said plans and specifications being the same approved by the United States.

2nd. That in pursuance of said contract, your intervenor fully complied with his said contract by furnishing all the material called for under said contract, and furnishing the labor in installing same as required by the plans and specifications used in constructing said Postoffice building; which said contract was completed on the 20th day of July, 1912, and final settlement authorized by the

11 Treasury Department on August 21st, 1912; whereupon said Ambrose B. Stannard became indebted to your intervenor in the sum of $3,950.00.

3rd. Your intervenor shows further that his said work was properly done, according to the plans and specifications required by the

United States, and that the materials furnished were of the kind and class as required by the specifications under which said building was constructed by said Ambrose B. Stannard, and that same was accepted by the United States prior to final settlement with said Ambrose B. Stannard.

4th. Your intervenor further shows that in addition to the amount of said contract price he was required by said Stannard, or his representative, to furnish the material and labor as shown by the itemized statement hereto attached and marked Exhibit "B," and made a part hereof, whereby said Ambrose B. Stannard became further indebted to your intervenor in the sum of $87.60, making the total amount in which said Ambrose B. Stannard became indebted to your intervenor of $4,037.60.

5th. That on June 13th, 1911, there was a payment of $1,000; on November 7th, 1911, a payment of $675.00, making a total of $1,675.00 paid by said Ambrose B. Stannard on said contract price; and on June 26th, 1912, the government deducted $5.00 on the tanks for closets and one radiator short, making a total credit on said amount due your intervenor of $1,685.00, leaving a balance due of $2,352.60, besides interest from July 20th, 1912, at 7%.

6th. That your intervenor has made repeated demands upon said Ambrose B. Stannard for payment of said sum due him, all of which have been refused, and said amount, with interest as aforesaid, is now past due and unpaid.

7th. Your intervenor further shows that said Illinois Surety Company by reason of said Ambrose B. Stannard's failure to pay said balance due upon said contract for material and labor furnished, in the construction of said post-office building, is indebted to your intervenor in the sum of $2,352.60, said Illinois Surety Company being the surety on the bond given by said Ambrose B. Stannard to the United States as required by the department under which said building was constructed

12 Wherefore, your intervenor respectfully prays that his rights in the premises be determined in said above stated cause, and that he have judgment against said principal and surety in said sum, and for such other and further relief to which he may be entitled in the premises.

PIERCE BROS.,
Attorneys for Intervenors.

Thereafter, on the 27th day of June, 1913, B. F. Holley and H. P. Dyches, partners trading under the firm name of Holley & Dyches, filed the following petition of intervention in said action:

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering & Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now come B. F. Holley and H. P. Dyches, partners, trading as Holley & Dyches, of Aiken, S. C., and in said district, and file this their intervention in the above stated cause in pursuance of a notice served upon them on the — day of March, 1913, signed by John L. Rendleman, attorney-at-law for the above named plaintiffs, and respectfully show:

1st.

That your intervenors, B. F. Holley and H. P. Dyches, partners, trading as Holley & Dyches, between the first day of August, 1911, and the first day of January, 1912, at the special instance and request of the defendant, Ambrose B. Stannard, furnished to the said Ambrose B. Stannard drayage, crushed rock and labor in the excavation of a cellar under the post-office building at Aiken,
13 S. C., to the amount of two thousand, six hundred and thirty-four and 58/100 dollars, upon which account has been paid the sum of two thousand, one hundred and thirty-three and 87/100 dollars, leaving a balance due of five hundred and 71/100 dollars.

2nd.

That Ambrose B. Stannard and the United States accepted from your intervenors the labor and materials furnished as aforesaid, said work, drayage, labor and materials having been furnished by your intervenors to the said Ambrose B. Stannard in the necessary prosecution of the work being done by the said Ambrose B. Stannard, to-wit: the building of a U. S. post-office building at Aiken, S. C., for said United States.

3rd.

That the defendant, Ambrose B. Stannard, through his superintendent, A. C. Wyckoff, admitted in writing on the — day of August, 1912, the aforesaid balance to be correct; that the said sum of five hundred and 71/100 dollars is long past due, with interest thereon from January 1st, 1912.

4th.

That your intervenors have made repeated demands upon said Ambrose B. Stannard for payment of said sum due them, all of which have been refused, and said amount, with interest as aforesaid, is now past due and unpaid.

5th.

That your intervenors further show that the said Illinois Surety Company, by reason of said Ambrose B. Stannard's failure to pay said balance as aforesaid, in the construction of said post-office building at Aiken, S. C., is indebted to your intervenors in the sum of five hundred and 71/100 dollars, with interest as aforesaid, said Illinois Surety Company being the surety on the bond given by the said Ambrose B. Stannard to the United States as required by the department under which said building was constructed.

Wherefore, your intervenors respectfully pray the court that their rights in the premises be determined in said above stated
14 cause, and that they have judgment against said principal and surety in said sum, and for such other and further relief to which they may be entitled in the premises.

CROFT & CROFT,
Attorneys for Intervenors.

Each of the defendants served separate answers, containing general denials of the facts alleged in the foregoing petitions of intervention.

Thereafter, on the 22nd day of September, 1913, the defendants each served, and filed, notices of a motion, in the nature of a demurrer, to dismiss the original complaint, with the foregoing petitions of intervention, in this action. The notice served and filed by the Illinois Surety Company being in form as follows:

"UNITED STATES OF AMERICA,
Eastern District of South Carolina, Fourth Circuit:

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Jr., Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, Intervenor; B. F. Holley and H. P. Dyches, Partners, Trading as Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

To Messrs. John L. Rendleman and D. W. Robinson, Plaintiff's Attorneys; Croft & Croft, Attorneys for H. P. Dyches & B. F. Holley; Pierce Bros., Attorneys for E. J. Erbelding, Intervenors:

Please take notice, that the undersigned, counsel for the Illinois Surety Company, defendant in the above entitled action, will at

ten o'clock in the forenoon on Friday, the 3rd day of October,
15 1913, or as soon thereafter as counsel can be heard, move upon the original complaint and petitions of intervention filed in the said action, before the Honorable Henry A. M. Smith, United States Judge in the District Court of the United States for the Eastern District of South Carolina, in the United States Court House in Charleston, South Carolina, for an order dismissing the original complaint, together with the petitions of intervention filed in the above entitled action, upon the grounds:

1. That it appears upon the face of said original complaint that it does not state facts sufficient to constitute a cause of action against this defendant, Illinois Surety Company, either at common law or under the provisions and requirements of the act of Congress of February 24th, 1905 (33 Stat. at Large, 811, chap. 778; Comp. Stat. Supp., 1909, p. 948), amending the act of August 13th, 1894 (28 Stat. at L., 278, chap. 280; U. S. Comp. Stat., 1901, p. 2523), and acts amendatory thereof, or any other act of Congress, in that the original complaint does not allege or state that there has been a completion and final settlement of the contract, between said Ambrose B. Stannard and A. Piatt Andrews, assistant secretary of Treasury of the United States, for and in behalf of the United States of America, mentioned in the complaint; nor that the United States had made the last payment to be made by it upon said contract; nor when, if ever, such completion, final settlement or payment were had; nor that such competition and final settlement were had more than six months, and within one year, prior to the time of the commencement of this action.

2. That it appears upon the face of said petitions of intervention filed in the above entitled action by said E. J. Erbelding and by said B. F. Holley & H. P. Dyches, partners, trading as Holley & Dyches, that neither of said petitions of intervention state facts sufficient to constitute a cause of action against this defendant, Illinois Surety Company, in that neither of said petitions state when, if ever, a final settlement was had between said Ambrose B. Stannard and the United States of America, or its officer or officers acting on its behalf, of the contract mentioned in the said complaint; nor that such final settlement was had more than six months, and within one year, before the time of the commencement of this action.

16 3. That even if it should be held that the complaint states facts sufficient to constitute a cause of action against this defendant, under the provisions of the acts of Congress in such case made and provided, this court is without jurisdiction to entertain, proceed in, or try this action at law, for the reason that the remedy and right of action given by the acts of Congress is equitable in its nature and cannot be inquired into or determined at law.

W. H. TOWNSEND,
Attorney for Illinois Surety Company, Defendant.

Columbia, S. C., Sept. 22nd, 1913.

The notice of motion and demurrer interposed by Ambrose B. Stannard was upon the same and similar grounds.

These motions and demurrers came on to be heard before the said court, the Honorable Henry A. M. Smith, United States District Judge, presiding, in Charleston, S. C., on the third day of October, 1913. At such hearing the plaintiffs and intervenors asked leave to amend the original complaint and petitions of intervention so as to allege therein the completion of the contract and final settlement thereof on the 21st day of August, 1912. The motion for leave to amend was opposed by the defendants on the grounds that: (1) that no cause of action being stated in the original complaint and petitions, there was nothing to amend by; and (2) that the year limited by the act of Congress within which the action might be brought had expired.

Both motions were heard together, and decided by the court in the following order:

"In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

17 This matter comes on to be heard upon a motion to dismiss the complaint. Due notice of this motion with the grounds thereof in writing have been given more than five days before the hearing, and at the hearing counsel for all interests concerned appeared and were heard. The motion to dismiss is based upon the ground that the complaint is brought under the provisions of the act of August 13, 1894, as amended by the act of 24th February, 1905, and does not allege that there has been a completion and final settlement of the contract between the obligor of the bond and the United States, and that the action has been brought subsequent to the expiration of six months after, and within one year from such completion and final settlement.

The complaint in the cause does not allege that there has been any completion and final settlement between the obligor of the bond, the contractor, and the United States, but does allege that the plaintiff has made the affidavit required by the Statute and procured from the assistant secretary of the treasury a certified copy of the original contract and bond, and upon such procurement alleges that this action was brought. Counsel for plaintiff contend that inasmuch as the plaintiff cannot bring the action until he has procured from the department a certified copy of the bond and contract the allegation that the department has permitted such copies is in effect an allega-

tion of the existence of the condition required by the statute, as these certified copies are presumptively only to be given by the department to a plaintiff in a position to bring the action.

The right of action upon which the complaint is based rests upon the statute. At common law a third party, such as a subcontractor, would have had no right of action upon the bond given to a wholly independent and third party, such as the United States. Under the view taken of this act by the United States Supreme Court, the statute was passed in recognition of the inability of such subcontractors, as the complaint states the plaintiff in this case to be, to take liens upon the public property of the United States, and that Congress passed the act in view of that condition of affairs, and to provide protection for those who could not protect themselves by the ordinary statutory remedies given to subcontractors to protect themselves in such cases, and that for these reasons the statute is one to which a liberal construction should be given by the court. The limitations in the statute are not intended primarily for the benefit of the
18 defaulting or failing original contractor and principal on the bond, but would appear to be intended for the protection of the United States in its enforcement of the bond and for the protection of all creditors entitled under the statute to the benefits of the bond, and for the protection of the sureties on the bond of the original contractor, so far as they should be protected from the inconveniences of being sued in separate harassing actions, and called to respond for the acts of their principal after the lapse of too deferred a period.

The right of action, however, is based upon and arises wholly out of the Statute, and under the decision of the Circuit Court of Appeals of this circuit in Baker v. U. S., 204 Fed. 390, the clauses of the act which create the right and permit its enforcement only if the action be brought within and during the time specified, are not clauses of ordinary limitation, but are conditions accompanying the creation and the gift of the right to the plaintiff. His right of ultimate recovery does not depend only upon the fact that the plaintiff is a creditor of the obligor of the bond for supplies or labor furnished under the contract, the performance of which is secured by the bond, and that his debt has not been paid, but upon the condition further that any creditor proposing to benefit by the statute must not sue prior to the expiration of six months from the completion and final settlement of the contract, and must sue within one year from that completion and settlement so as to give to the creditors the right to sue independently and apart from any suit by the United States, for a period of six months as stipulated in the statute, and no recovery can be had unless the plaintiff can make it appear that in bringing his action he has complied with these conditions. If the right of the plaintiff to recover rests upon his compliance with these conditions, then they are ultimate facts which should be pleaded so as to entitle the plaintiff in the adducing of his testimony on the trial to support his right of recovery by bringing himself within the terms of the statute as alleged in his pleadings.

These limiting conditions are no part of what may be said to be

the fundamental right of action given by the statute. The statute is intended for the benefit of the creditors of the original contractor, and the right of action under the statute is given to them in consideration of the fact that they cannot protect themselves by the other remedies that may exist in the case of the subcontractor on work performed on the property of an individual. The statute is
19 to be liberally construed from this standpoint, and from this standpoint the essential elements of the right of any party to avail himself of the benefit of the statute and bring himself within the category of the parties protected is that he must be a creditor whose labor or material was furnished in the construction of the work specified in the original contract; was furnished to the original contractor and that he has not been paid. The accompanying conditions that there has been a final completion of the contract and settlement with the United States, and that the action has been brought during the six months permitted by the statute, are not essential elements of the original benefits created by the statute, but are necessary conditions to show that the party attempting to avail himself of the statute stands in a position to do so, without which final recovery would not be allowed. The failure to allege them in the complaint is not a failure to allege any cause of action created by the statute, but is a failure to so sufficiently, amply and fully state the cause of action relied upon as to properly allow final judgment to be awarded in behalf of the plaintiff and properly advise the defendant who is called upon to defend himself of the facts which he has to meet upon the trial. If the statute be construed liberally for the benefit of those for whom it was intended, then to hold that the obligor, the original contractor, the defaulting debtor, can be freed from liability as created by the statute by an omission to allege amply the existence of all these conditions, would be to turn to his benefit provisions which were not meant for him. In the language of the Supreme Court of the United States, these conditions if carried to such an extent would defeat the purpose of the statute and would unreasonably interfere with the ultimate benefit intended by it.

In the opinion of the court, therefore, while the facts required by the statute as showing that a final completion and final settlement of the contract with the United States was had, and that the action has been brought within the period prescribed by the statute, are not as clearly and amply stated as they should be, yet a cause of action is sufficiently pleaded in the complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect by way of amendment, under the rule upheld by the Supreme Court of the United States in the case of Missouri, Kansas & Texas Railway Co. v. Wulf, 226 U. S., p. 570.

20 It is therefore ordered, that unless the plaintiff shall within twenty days from the date of this order amend his complaint by alleging in due and sufficient form that there has been a full compliance with the conditions of the statute in the provisions, the compliance with which by this motion are claimed to be not sufficiently averred, the defendants may on proof of such failure, without further notice, move for a dismissal.

In one of the interventions herein brought, to-wit, that filed on behalf of E. J. Erbelding, it is alleged that the contract was completed on the 20th day of July, 1912, and final settlement authorized by the Treasury Department on August 21st, 1912. From this it would inferentially appear in pursuance of the positive allegation that there has been completion and final settlement, that the intervention herein has been interposed within the six months' period allowed by the statute; although there is no allegation that the United States has not brought an action within the six months' period allowed to it, and for an inference on that point it would have to be rested upon the theory that this court would take judicial cognizance if any such action was brought.

The plaintiff having been allowed, if he sees fit, to amend, it need not be considered whether or not this allegation in the intervening petition could be used to supplement and supply any defects and omissions in the way of full and complete settlement in the original contract. The intervenors will be allowed the same time to make any amendments that they may be advised necessary in their intervention, and that question need not be considered unless the plaintiff shall within the time permitted by this order fail to amend his pleading as herein allowed.

The defendants are hereby allowed twenty (20) days after the service of any amended complaint or intervening petition herein upon them or their attorneys within which to answer the same.

The motion to dismiss was also made on the ground that this action should be brought in equity and not at law. In the opinion of the court the action is properly brought as an action at law, and the motion to dismiss on that ground is refused.

HENRY A. M. SMITH,
United States Judge for South Carolina.

October 4th, 1913.

21 The defendants excepted to the foregoing order refusing to dismiss the original complaint and petitions of intervention, and granting the plaintiffs and intervenors leave to amend the same, on the ground that the district judge erred in holding and concluding:

(1) That the limitations in the Statute, so far as the surety on the bond of the original contractor is concerned, were only intended to protect such surety from the inconveniences of being sued in separate harassing actions, and of being called to respond for the acts of its principal after the lapse of too deferred a period; and

(2) That the conditions that there should have been a completion of the contract and final settlement with the United States, and that the action be brought within the six months permitted by the statute, are not essential elements of the original benefit created by the statute and are no part of the fundamental right of action given by the statute; and

(3) That the failure to allege the occurrence of these conditions is not a failure to allege a cause of action under the statute; and

(4) That the allegation in the complaint that the plaintiff had

made the affidavit required by the statute and procured from the assistant secretary of the Treasury a certified copy of the original contract and bond, was in effect an allegation of the existence of the conditions required by the statute as a prerequisite to the bringing of the action; and

(5) That a cause of action under the statute was sufficiently pleaded in the original complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect, by way of amendment; and in refusing the motion to dismiss the complaint; and

(6) That the court could grant, and in granting, leave to amend the complaint, and intervening petitions, by alleging in due and sufficient form that there had been a full compliance with the conditions of the statute in the provisions, the compliance with which by this motion was claimed not to be sufficiently alleged; and

22 (7) That the petition of intervention filed on behalf of E. J. Erbelding alleged a cause of action under the statute on behalf of said intervenor; and

(8) That the action given by said statute is at law.

On October 9th, 1913, the plaintiffs served and filed the following amended complaint:

Amended Complaint.

Filed Oct. 17, 1913.

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering & Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

The plaintiffs herein, amending their complaint by leave of the court, and complaining of the defendants, allege:

1. That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, at all times hereinafter mentioned and now are residents and citizens of the State of North Carolina, of the Western District of North Carolina, and reside near Salisbury, Rowan county, in said district, and in said State of North Carolina.

2. That at the times hereinafter mentioned, the Carolina Electrical Company was a corporation organized and existing under the laws of the State of North Carolina, and that on the 4th day of October, 1912, Joseph B. Cheshire, Jr., was appointed receiver of said corporation.

23 3. That the defendant, Ambrose B. Stannard, at the times hereinafter mentioned was and now is a resident of the State of New York, of the Southern District of New York, and resides and has his principal place of business in the city of New York, said State.

4. That the defendant, the Illinois Surety Company, is a corporation duly authorized to do an insurance and bonding business.

5. That on the 5th day of July, 1910, Ambrose B. Stannard entered into a written contract with one A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, for the construction in behalf of the United States of America *for the construction* of a U. S. post-office building at Aiken, S. C., for the agreed compensation of $45,618.00. That, among other things, it was stipulated in the contract that Ambrose B. Stannard "furnish all of the labor and materials and do and perform all the work required for the construction, complete, of the Post Office at Aiken, South Carolina," the work to be completed by August 1st, 1911.

6. That the United States required of the defendant, Ambrose B. Stannard, a bond, which was executed by the defendant, the Illinois Surety Company, as surety, on the 7th day of July, 1910, in the penal sum of twenty-three thousand dollars, to be paid unto the United States of America, which bond contained the condition: "Now, if the said Ambrose B. Stannard shall well and truly fulfill all the covenants and conditions of said contract and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in, or additions to, or ommissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by him to be performed in any and all such changes in or additions thereto, notice thereof to said surety being hereby waived, and shall promptly *made* payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."

24 7. That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, entered into a contract with the said Ambrose B. Stannard to supply him with certain material to be used in the prosecution of the work provided for in such contract, and that afterwards the said Faith Granite Company entered upon the *the* performance of said contract, and in due performance thereof, between the 20th day of September, 1910, and the 24th day of April, 1911, the said Faith Granite Company, at the special instance and request of the said Ambrose B. Stannard, furnished, supplied and delivered to the said Ambrose B. Stannard certain cut granite work as provided for and in accordance with the plans and specifications furnished for this work by James Knox Taylor, supervising architect for the United States, which said cut granite work was used in the construction of said post-office building, and for which said cut granite work the said Ambrose B. Stannard promised to pay

the sum of thirty-eight hundred and twenty-nine and 05/100 dollars, less the freight charges, which amounted to the sum of $842.25.

8. That the defendant, Ambrose B. Stannard, has paid no part of said account, except the freight charges of $482.25, and that *that* there is now unpaid and due on said account the sum of thirty-three hundred and forty-six and 80/100 dollars, with interest thereon from June 24th, 1911.

9. That the said Ambrose B. Stannard has made repeated promises from time to time to pay his said account; that he offered on May 17th, 1912, to give his note for 60 days, with interest at six per cent., which offer was not accepted; that notwithstanding the oft and repeated promises of said defendant to pay, he has failed and refused to make settlement and no part of said account has been paid except the freight charges as stated.

10. That on the 16th day of January, 1911, the Carolina Electrical Company, of the city of Raleigh, N. C., entered into a written contract with the said Ambrose B. Stannard for certain portions of the work, to wit, to furnish all material and labor required under said contract to do all of the work specified under the heading, "Conduit and Wiring System," page 36 of the specifications
25 of said contract, to the heading "Approaches," and the wiring of the exterior lamp standards, all in accordance with the plans and requirements of said contract and the samples, brands, fixtures, appliances, etc., required and approved by the supervising architect for use under said contract; that the said Carolina Electrical Company faithfully complied with the terms of said contract and furnished the said labor and materials required therefor; that the said Ambrose B. Stannard promised to pay the said Carolina Electrical Company, including extra order amounting to the sum of twenty-five dollars, for said labor and material, the sum of eight hundred dollars, upon which account has been paid the sum of three hundred and one and 31/100 dollars, leaving unpaid the sum of four hundred and ninety-eight and 69/100 dollars, with interest thereon from January 1st, 1912, at the rate of six per cent per annum.

11. That on the 16th day of November, 1912, plaintiffs made the affidavit required by the statute, and procured from the assistant secretary of the Treasury certified copies of the original contract and bonds.

12. That Ambrose B. Stannard and the United States accepted from the Faith Granite Company the materials furnished as aforesaid, and the said Ambrose B. Stannard and the United States also accepted the labor and materials furnished by the said Carolina Electrical Company, said work and material being performed and done and said material furnished by the said plaintiffs in the necessary prosecution of the work required by the original contract.

13. That on or about the 1st day of March, 1913, the claim of Carolina Electrical Company against the said Ambrose B. Stannard, for work, labor and materials furnished, amounting to the said sum of $498.69, was assigned and transferred for value to the plaintiff, Electrical Engineering and Contracting Company, by the

said Joseph B. Cheshire, receiver of Carolina Electrical Company, and the said Electrical Engineering & Contracting Company is now the sole owner of said account, and succeeds to all the rights incident to said account heretofore belonging to the said Caro-
26 lina Electrical Company; that said Electrical Engineering and Contracting Company is a corporation organized and existing under the laws of the State of North Carolina.

14. That the contract by and between Ambrose B. Stannard and A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, made and entered into on the 5th day of July, 1910, was completed by the said Ambrose B. Stannard on the 20th day of July, 1912, and final settlement was made by the Treasury Department of the United States on August 21st, 1912, with the said Ambrose B. Stannard.

15. That no suit was brought by the United States against Ambrose B. Stannard and his surety, the Illinois Surety Company, within six months from the completion and final settlement of said contract upon the contract and bond hereinbefore referred to.

16. That the plaintiffs herein named commenced this action more than six months after the completion and final settlement of said contract above mentioned, and within one year from said completion and final settlement.

Wherefore, the plaintiffs, Faith Granite Company, demands judgment that they recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of thirty-three hundred, forty-six and 80/100 dollars, with interest from June 24th, 1911; and the plaintiff, Electrical Engineering and Contracting Company, demands judgment that it recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of four hundred and ninety-eight and 69/100 dollars, with interest from January 1st, 1912, until paid.

2nd. For the costs of the action.

3rd. For such other and further relief to which the plaintiff may be entitled.

J. L. RENDLEMAN,
D. W. ROBINSON,
Attorneys for Plaintiffs.

October 9th, 1912.

27 On October 11th, 1913, the intervenors, Holley & Dyches, served and filed the following amended petition:

Amended Petition for Intervention by Holly and Dyches.

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

Filed Oct. 17, 1913.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now comes B. F. Holley and H. P. Dyches, partners, trading as Holly & Dyches, of Aiken, S. C. and in said district, and file this their intervention in the above stated cause in pursuance to a notice served upon them on the — day of March, 1913, signed by John L. Rendleman, attorney-at-law for the above named plaintiffs, and respectfully show:

1. That your intervenors, B. F. Holly and H. P. Dyches, partners, trading as Holly & Dyches, between the first day of August, 1911, and the first day of January, 1912, at the special instance and request of the defendant, Ambrose B. Stannard, furnished to the said Ambrose B. Stannard drayage, crushed rock and labor in the excavation of a cellar under the post-office building at Aiken, S. C., to the amount of two thousand, six hundred and thirty-four and 58/100 dollars, upon which account has been paid the sum of two thousand, one hundred and thirty-three and 87/100 dollars, leaving a balance due of five hundred and 71/100 dollars.

28 2. That Ambrose B. Stannard and the United States accepted from your intervenors the labor and materials furnished as aforesaid, said work, drayage, labor and materials having been furnished by your intervenors in the necessary prosecution of the work being done by the said Ambrose B. Stannard, to-wit: the building of the U. S. Post-office building at Aiken, S. C., for the said United States.

3. That the defendant, Ambrose B. Stannard, through his superintendent, A. C. Wyckoff, admitted in writing on the — day of August, 1912, the aforesaid balance to be correct; that the said sum of five hundred and 71/100 dollars is long past due, with interest thereon from January 1st, 1912.

4. That your intervenors have made repeated demands upon said Ambrose B. Stannard for payment of said sum due them, all of

which have been refused and said amount, with interest as aforesaid, is now past due and unpaid.

5. That your intervenors further show that the said Illinois Surety Company by reason of said Ambrose B. Stannard's failure to pay *a* said balance due as aforesaid, in the construction of said Post-office building at Aiken, S. C., is indebted to your interveners in the sum of five hundred and 71/100 dollars, with interest as aforesaid, said Illinois Surety Company being the surety on the bond given by the said Ambrose B. Stannard to the United States, and required by the department under which said building was constructed.

6. That the contract by and between Ambrose B. Stannard and A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, made and entered into on the 5th day of July, 1910, was completed by the said Ambrose B. Stannard on the 20th day of July, 1912, and final settlement was made by the Treasury Department of the United States on August 21st, 1912, with the said Ambrose B. Stannard.

7. That no suit was brought by the United States against Ambrose B. Stannard and his surety, the Illinois Surety Company, within six months from the completion and final settlement of said contract upon the contract and bond hereinbefore referred to.

29 8. That these intervenors filed their petition more than six months after the completion and final settlement of the contract above mentioned and within one year from said completion and final settlement.

Wherefore, your petitioners respectfully pray the court that their rights in the premises be determined in said above stated cause, and that they have judgment against said princip*le* and surety in said sum, and for such other and further relief to which they may be entitled in the premises.

CROFT & CROFT.
Attorneys for Intervenors.

Oct. 11th, 1913.

On the 13th day of October, 1913, the intervenor, E. J. Erbelding, served and filed the following amendment to his petition of intervention:

Amendment to Petition of E. J. Erbelding.

Filed Oct. 15, 1913.

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now comes E. J. Erbelding, of Augusta, Ga., one of the intervenors in the above stated case, and after obtaining leave of the court, amends his intervention of file therein as follows:

By amending paragraph two thereof to read as follows (words added by amendment being *italicized*):

30 1st. That in pursuance of said contract *between the United States and the said Ambrose B. Stannard, whereby the said Ambrose B. Stannard was to furnish all the material and labor that was necessary to build and complete said Post-Office building at Aiken, in the county of Aiken, State of South Carolina, at and for the agreed compensation of $45,618.00,* your intervenor fully complied with his said contract by furnishing all the material called for under said contract, and furnishing the labor in installing same as required by the plans and specifications used in constructing said post-office building. Said *original* contract *between said Ambrose B. Stannard and the United States* was completed on the 20th day of July, 1912, and final settlement authorized by the Treasury Department on August 21st, 1912, *which said final settlement for Said Original contract between the United States and said Ambrose B. Stannard was actually had more than six months before the filing of this intervention, and that same was filed before the expiration of one year after the complete performance of said contract and final settlement therefor, as aforesaid; and that no suit was brought by the United States in its own behalf against the said Ambrose B. Stannard, and the surety on his bond, the Illinois Surety Company, during the first six months after the final completion of, and final settlement for, said original contract;* whereupon said Ambrose B. Stannard became indebted to your intervenor in the sum of $3,950.00.

2nd. By amending paragraph seven of his intervention so as to read as follows (words added by way of amendment being *italicized*):

Your intervenor further shows that the Illinois Surety Company, by reason of said Ambrose B. Stannard's failure to pay said balance due upon said contract for material and labor furnished, in the con-

struction of said post-office building, is indebted to your intervenor in the sum of $2,353.50, said Illinois Surety Co. being the surety on the bond given by said Ambrose B. Stannard to the United States as required by the department under which said building was constructed, *which said bond was conditioned as follows: "Now, if the said Ambrose B. Stannard shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of and perform*
31 *all the work and furnish all the labor and materials required by any and all changes in, or additions to, or omissions from said contract which may hereafter be made, and perform all the undertakings stipulated by him to be performed in any and all such changes in or additions thereto, notice thereof to the said surety being waived, and shall promptly make payment to all persons supplying labor and materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."*

Wherefore, intervenor prays that the above amendment be made a part of his original intervention.

PIERCE BROS.,
Attorneys for Intervenor.

On the 15th day of October, 1913, the defendant, Illinois Surety Company, served, and filed, the following answers to said amended complaint and petition of intervention:

Answer of Illinois Surety Co. to Amended Complaint.

Filed Oct. 20, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina, at Columbia.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

The defendant, Illinois Surety Company (not waiving but reserving and insisting upon its right to except to the order of the
32 court permitting the plaintiffs to serve an amended complaint in this action), answering the amended complaint in the above entitled action:

First. For a first defense, alleges: That no final settlement of the

contract mentioned in the fifth paragraph of the amended complaint between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting on its behalf, had been made or had six months prior to the 4th day of March, 1913, the date of the commencement of this action; and that the commencement and prosecution of this action was, and is, unauthorized, as against this defendant, Illinois Surety Company, under act of Congress, or any other law.

Second. For a second defense, alleges: That the final settlement of the contract mentioned in the fifth paragraph of the amended complaint between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, was had and made between the parties to said contract more than one year before the time of the making of the order permitting the service of the amended complaint in this action, and more than one year prior to the time of the service and of the filing of said amended complaint; and that whatever right of action the plaintiffs may have had against this defendant upon the bond mentioned in the complaint was then lost and barred under the terms and limitations contained in the act of Congress.

Third. For a third defense against the claim of the Engineering and Contracting Company, alleges: That neither the Electrical Engineering and Contracting Company nor the Carolina Electrical Company were at the times mentioned in the complaint, nor now are, a corporation organized or existing under the laws of any state; nor was Joseph B. Cheshire at the times mentioned in the complaint a receiver of said Carolina Electrical Company, nor was he authorized to transfer any choses of action belonging to said Carolina Electrical Company for the purpose of permitting actions to be maintained thereon in the courts of this State.

Fourth. For a fourth defense: Denies the allegations of paragraphs two, ten, thirteen and sixteen of said amended complaint, and also denies that final settlement of the contract mentioned in
33 paragraphs five and fourteen of said amended complaint was had on August 21st, 1912, and says, on the contrary, that such final settlement was not had until the 11th day of September, 1912, on which last mentioned day a checque was issued by the disbursing officer of the United States for the amount due the said Ambrose B. Stannard in final settlement of said contract.

Denies that said Ambrose B. Stannard promised or agreed to pay the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, the sum of thirty-eight hundred and twenty-nine and 05/100, less freight charges, for the material and labor furnished, mentioned in paragraph seven of the amended complaint, and says he only promised and agreed to pay the sum of three thousand, six hundred and twenty-five dollars for the material called for by said contract, to be approved by the officers of the United States, prepared in a workmanlike manner, and delivered free on board of cars at Aiken, South Carolina, promptly and as fast as it might be needed by said Stannard to enable him to carry out his said contract with the United

States, and that this defendant denies that this work was done, and this material furnished, by said Faith Granite Company either promptly as needed by said Stannard or as required by said contracts; and denies that there is now unpaid or due to the said Fith Granite Company by said Ambrose B. Stannard any sum whatever in excess of the sum of eighteen hundred and forty-six and 86/100 dollars; and says that the offer to give his note in settlement of claim against him was made as an offer of compromise only, and not as an admission of the amount claimed by the plaintiffs to be due them. Says that a large portion of the material furnished by the plaintiffs was in such condition or shape that it could not be used and had to be discarded and rejected.

Fifth. For a fifth defense, and by way of off-set or counter claim against the claim of the Faith Granite Company, alleges: That by reason of, and in consequence of, the unworkmanlike and incorrect manner in which the Faith Granite Company cut and prepared the granite and stone furnished to said A. B. Stannard by them, and the careless and negligent delays made by them in preparing and
34 furnishing the material called for by their contract with the said A. B. Stannard, the said A. B. Stannard was delayed for more than one hundred and forty-nine days in the completion of his contract with the government for the construction of said post-office building, in consequence of which delay he lost the sum of seven hundred and ninety-two and 61/100 dollars, deducted from the moneys which would otherwise have been paid him by the government under said contract, and also the further sum of two hundred and sixty-one dollars and eighty-seven cents deducted by the government from the funds which would otherwise have been paid him had the said stone and granite been promptly furnished by said Faith Granite Company in proper condition when needed by said Stannard in the performance of his contract with the government for the construction of said building; and was otherwise damaged in the loss of time of hands employed by him, and additional expenses incurred, to the extent of fifteen hundred dollars; which amount this defendant claims and demands should be offset against and deducted from the amount claimed in this action by the Faith Granite Company.

Wherefore, the defendant, Illinois Surety Company, demands judgment that the above entitled action be dismissed.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.

Columbia, S. C., October 15th, 1913.

35 *Answer of Illinois Surety Company to Petition of Intervention Filed by Holley & Dyches.*

Filed Oct. 20, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South South Carolina, at Columbia.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

The defendant, Illinois Surety Company (not waiving but reserving and insisting upon its right to except to the order of the court permitting said intervenors to serve an amended petition, and the plaintiffs to serve an amended complaint in this action), answering the amended petition of intervention filed by B. F. Holley and H. P. Dyches in the above entitled action:

First. For a first defense, alleges: That no final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the sixth, seventh and eighth paragraphs of said amended petition, between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, had been made or had six months prior to the 4th day of March, 1913, the date of the commencement of this action; and that the commencement and prosecution of this action was, and is, unauthorized, as against this defendant, Illinois Surety Company, under act of Congress or any other law.

36 Second. For a second defense, alleges: That the final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the sixth, seventh and eighth paragraphs of said amended petition, between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, was had and made between the parties to said contract more than one year before the time of the making of the order permitting the service of the amended petition of intervention by the above named petitioners, and more than one year before the making of any order allowing the intervention of the petitioners in this action, and more than one year prior to the time of service of said amended complaint and said amended petition, and that whatever right of action the said petitioners may have had against this defendant upon the bond mentioned in the amended complaint and the amended peti-

tion was then lost and barred under the terms and limitations contained in the act of Congress.

Third. For a third defense, Denies the allegations of the fifth paragraph of said amended petition, and says that it has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in the first, second, third and fourth paragraphs of said amended petition, and therefore denies the same.

Denies that the final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the sixth, seventh and eighth paragraphs of the amended petition, was had on August 21st, 1912; and says, on the contrary, that such final settlement was not had until the 11th day of September, 1912, on which last mentioned day a checque was issued by the disbursing officer of the United States for the amount due the said A. B. Stannard in final settlement of said contract.

Says that there was no order taken permitting the petitioners to file their petition, or to intervene, in this action during the period commencing six months after the final settlement of said contract and ending one year after the time of such final settlement.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.

Columbia, S. C., October 15th, 1913.

37 *Answer of Illinois Surety Company to Amended Petition of Intervention Filed by E. J. Erbelding.*

Filed Oct. 20, 1913.

UNITED STATES OF AMERICA.
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina, at Columbia.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

The defendant, Illinois Surety Company (not waiving but reserving and insisting upon its right to except to the order of the court permitting the said intervenor to serve an amended petition, and the plaintiffs to serve an amended complaint), answering the amended petition of intervention filed by E. J. Erbelding in the above entitled action:

First: For a first defense, alleges: That no final settlemen- of the contract mentioned in the fifth paragraph of the amended complaint, and in the second and seventh paragraph of the amended petition, between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, had been made or had six months prior to the 4th day of March, 1913, the date of the commencement of this action; and that the commencement and prosecution of this action was, and is, unauthorized as against the defendant under any act of Congress or other law.

38 Second. For a second defense, alleges: That the final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the second and seventh paragraphs of said amended petition, between Ambrose B. Stannard and the United States of America, or its officers acting in its behalf, was had or made between the parties to said contract more than one year before the making of the order permitting the service of the amended complaint and amended petition of intervention by the above named intervenor, and more than one year prior to the time of the making of any order allowing the intervention of the petitioners in this action, and more than one year prior to the time of the service of the amended complaint and said amended petition, and that whatever right of action the said petitioner may have had against this defendant upon the bond mentioned in the amended complaint and amended petition was then lost and barred under the terms and limitations contained in the act of Congress.

Third. For a third defense, says: That it has not knowledge or information sufficient to form a belief as to the truth of the allegations of the third, fourth, fifth and sixth paragraphs of said petition of intervention, or any of said paragraphs, and therefore denies the same.

Denies that the petitioner fully performed the contract made between him and the said Stannard, and denies that the final settlement of the contract mentioned in the fifth paragraph of the complaint, and in the second and seventh paragraphs of said amended petition, was had on the 21st day of August, 1912, and says, on the contrary, that such final settlement was not had until the 11th day of September, 1912, on which last mentioned day a checque was issued by the disbursing officer of the United States for the amount due said A. B. Stannard in final settlement of said contract.

Says that there was no order taken permitting the petitioner to file his petition of intervention, or to intervene, in this action during the period commencing six months after the final settlement of said contract, and ending one year after the time of such final settlement.

Denies that there was any agreement by the defendants, or either of them, to pay interest to the petitioner on the moneys mentioned in the petition and that any interest thereon is due by this defendant.

39 Fourth. For a fourth defense: Alleges upon information and belief that all of the contract price which was to have been paid said E. J. Erbelding by said Ambrose B. Stannard has been paid

him, except the sum of eighteen hundred and fifty-eight and 96/100 dollars.

Fifth. For a fifth defense, and by way of set-off or counter claim against the claim of the petitioner, this defendant, upon information and belief, alleges: That said E. J. Erbelding negligently performed the work required of him under said contract in a negligent, dilatory and inefficient way and manner, and delayed remedying the errors made by him in the performance of said contract until compelled by the defendant, Ambrose B. Stannard, and the gov-ment to correct the same, and in consequence of such negligent delay and dilatory action on the part of said E. J. Erbelding in the performance of said contract the completion of said work was delayed for one hundred and forty-nine days beyond the date at which said work should have been completed under the terms of the contract, and in consequence of such delay deductions to the amount of seven hundred and ninety-two and 61/100 dollars were made by the government from the amount which the government would have paid for said work had it been completed within the time limited by the contract, and said negligent delay on the part of the petitioner in performing his said contract the defendant, Ambrose B. Stannard, was put to and forced to incur other additional expenses in the completion of said work, to his damage in the sum of fifteen hundred dollars, which should be offset against the moneys claimed by the petitioner.

W. H. TOWNSEND,
Attorney for Illinois Surety Company, Defendant.

Columbia, S. C., October 15th, 1913.

The defendant, Ambrose B. Stannard, also answered said amended complaint and amended petitions, setting up substantially the defenses set up by the Illinois Surety Company, and the supplemental and additional defense that during the pendency of this action he had been adjudicated a bankrupt and received a discharge in bankruptcy from his individual liability on the contracts stated in the pleadings in this action. This supplemental defense in favor of said Stannard being sustained by the court in its order, or findings of fact
40 and conclusions of law at the hearing on the merits, the answers of said Stannard in these proceedings are omitted from this bill of exceptions as irrelevant matter.

On October 31st, 1913, the plaintiffs and the intervenor Erbelding served and filed replies, containing general denials of so much of the foregoing answers of the Illinois Surety Company as alleged causes of action for set-off against them, respectively.

Jury trial of the issues involved was waived by written stipulation of the attorneys for all parties, plaintiffs, intervenors and defendants, and the action came on to be heard before the Honorable Henry A. M. Smith, United States Judge, in the November, 1913, term of the District Court of the United States for the District of South Carolina, at Columbia, S. C.

The plaintiffs offered in evidence copies of the charters of articles of incorporation of the Electrical Engineering and Contracting Com-

pany and of the Carolina Electrical Company from the office of the secretary of state of the State of North Carolina, certified under his signature and the great seal of that state, the certificate being in form as follows:

5939.

NORTH CAROLINA,
Wake County:

Certificate of Incorporation of "Carolina Electrical Company."

This is to certify that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the laws of the State of North Carolina, as contained in Chap. 21 of the Revisal of 1905, entitled "Corporations," and do severally agree to take the number of shares of capital stock in the said corporation set opposite our names, respectively, and to that end do hereby set forth:

First. The name of the corporation is "Carolina Electrical Company."

41 Second. The location of the principal office of the corporation shall be at and in the city of Raleigh, State of North Carolina.

Third. The objects of this corporation are as follows:

(1) To contract for the installation of, and to install in public and private buildings, on the streets of towns and cities, on the highways and elsewhere, systems or plans for electric lighting, gas lighting, heating by steam, water or hot air, sewerage, power furnishing, and any and all kinds of plumbing, wiring, and any and all kinds of construction work and equipment of buildings, railways, electric lighting and power work, gas work, &c., and to buy, sell, manufacture and install electrical apparatus, fixtures and supplies, and gas and steam engines and supplies, and automobiles and automobile supplies.

(2) To erect, build, establish and maintain any sort of building, equipment and appliances, and at its pleasure, to sell or otherwise dispose of any part thereof, and to sub-lease or rent any part of its building or equipment.

(3) To conduct shops for the manufacture, repair and sale of any kind of machinery or articles, and to conduct a store or stores, for the sale of machinery and any other articles of merchandise.

And in order to prosecute the objects and purposes above set forth, the corporation shall have full power and authority to purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property both real and personal in this State and other states, territories, &c.; to purchase the business, good will and other property of any individual, firm or corporation as a going concern, and to assume its debts, contracts and liabilities, provided such business is authorized by the powers herein contained; to construct, equip and maintain works, buildings, factories and plants, and to operate the same by hand, steam, water, electric or other motive power, and generally to perform all acts which may be deemed necessary or ex-

pedient for the proper and successful prosecution of the objects and purposes for which this corporation is created.

Fourth. The total amount of the capital stock of this corporation is $15,000.00 and the number of shares into which the same is divided is one hundred and fifty; of said stock $10,000.00, divided
42 into one hundred shares of the par value of $100.00 each, shall be general or common stock, and $5,000.00, divided into fifty shares of the par value of $100.00 each, shall be preferred stock. Said preferred stock shall entitle the holders to receive each year out of the net earnings of the company a fixed yearly dividend of seven per centum before any dividends shall be paid upon, or set apart, for said general or common stock. Such dividend on the preferred stock shall be cumulative and payable semi-annually. Said preferred stock shall, at the discretion of the company, be subject to redemption at par at the end of three years, or on any dividend day thereafter. However, this corporation may organize and begin business when forty-nine shares ($4,900.00) of the capital stock shall have been subscribed for.

Fifth. The names and post-offices addresses of the subscribers of stock, and the number of shares subscribed for by each, the aggregate of which being the amount of the capital stock with which this corporation will start business, are as follows:

	No. of Shares.
N. L. Walker, Raleigh, N. C.	Seventeen (17)
J. R. Young, Raleigh, N. C.	Four (4)
T. B. Crowder, Raleigh, N. C.	Four (4)
Mrs. F. P. Tucker, Raleigh, N. C.	Four (4)
C. K. Durfey, Raleigh, N. C.	Four (4)
D. J. Thompson, Raleigh, N. C.	Sixteen (16)

Sixth. The period of existence of this corporation is limited to sixty years.

Seventh. The board of directors of this corporation shall have the power, by vote of a majority of all the directors, and without the assent or vote of the stockholders, to make, alter, amend, and rescind the by-laws of this corporation.

In testimony whereof, we have hereunto set our hands and affixed our seals, this 23 day of March, 1908.

N. L. W...KER. [SEAL.]
T. B. CROWDER. [SEAL.]
C. K. DURFEY. [SEAL.]
D. J. THOMPSON. [SEAL.]

43 NORTH CAROLINA,
Wake County:

This is to certify that on this 23rd day of March, 1908, before me, a notary public, personally appeared N. L. Walker, T. B. Crowder, C. K. Durfey and D. J. Thompson, who, I am satisfied, are the persons named in and who executed the foregoing certificate of incorporation of "Carolina Electrical Company," and I having first made

known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

In testimony whereof I have hereunto set my hand and official seal this 23 day of March, 1908.

[NOTARIAL SEAL.] J. S. FULGHUM,
Notary Public.

My commission expires (2/18/10).

Filed March 24, 1908.

J. BRYAN GRIMES,
Secretary of State.

STATE OF NORTH CAROLINA,
DEPARTMENT OF STATE,
RALEIGH, July 17, 1913.

I, J. Bryan Grimes, secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (four (4) sheets) to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in the office at Raleigh, this 17th day of July, in the year of our Lord, 1913.

[OFFICIAL SEAL.] J. BRYAN GRIMES,
Secretary of State.

44 NORTH CAROLINA,
Wake County:

No. 9897.

Certificate of Incorporation of "Electrical Engineering and Contracting Company."

This is to certify that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the laws of the State of North Carolina, as contained in chapter 21 of the revisal of 1905, entitled "Corporations," and do severally agree to take the number of shares of capital stock in the said corporation set opposite our names respectively, and to that end do hereby set forth.

First. The name of the corporation is "Electrical Engineering and Contracting Company."

Second. The location of the principal office of the corporation shall be at and in the city of Raleigh, State of North Carolina.

Third. The objects of this corporation are as follows:

(1) To contract for the installation of, and to install in public and private buildings, on the streets of towns and cities, on the highways and elsewhere, systems or plans for electric lighting, gas lighting, heating by steam, water or hot air, sewerage, power furnishing, and any and all kinds of plumbing, wiring, and any and all kinds of construction work and equipment of buildings, railways, electric

lighting and power work, gas work, etc., and to buy, sell, manufacture and install electrical apparatus, fixtures and supplies, and gas and steam engines and supplies, and automobiles and automobile supplies.

(2) To erect, build, establish and maintain any sort of building, equipment and appliances, and at its pleasure, to sell or otherwise dispose of any part thereof, and to sublease or rent any part of its building or equipment.

(3) To conduct shops for the manufacture, repair and sale
45 of any kind of machinery or articles, and to conduct a store or stores, for the sale of machinery and any other articles of merchandise.

And in order to prosecute the objects and purposes above set forth, the corporation shall have full power and authority to purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property both real and personal in this State and other States, territories, etc., to purchase the business, good will and other property of any individual, firm or corporation as a going concern, and to assume its debts, contracts and liabilities, provided such business is authorized by the powers herein contained; to construct, equip and maintain works, buildings, factories and plants, and to operate the same by hand, steam, water, electric or other motive power, and generally to perform all acts which may be deemed necessary or expedient for the proper and successful prosecution of the objects and purposes for which this corporation is created.

Fourth. The total amount of the capital stock of this corporation is $15,000.00 and the number of shares into which the same is divided is one hundred and fifty; of said stock $10,000.00, divided into one hundred shares of the par value of $100.00 each, shall be general or common stock, and $5,000.00, divided into fifty shares of the par value of $100.00 each, shall be preferred stock. Said preferred stock shall entitle the holders to receive each year out of the net earnings of the company a fixed yearly dividend of seven per centum before any dividends shall be paid upon, or set apart, for said general or common stock. Such dividend on the preferred stock shall be cumulative and payable semi-annually. Said preferred stock shall, at the discretion of the company, be subject to redemption at par at the end of three years, or on any dividend day thereafter. However, this corporation may organize and begin business when fifteen shares ($1,500.00) of the capital stock shall have been subscribed for.

Fifth. The names and postoffices addresses of the subscribers of stock, and the number of shares subscribed for by each, the aggregate of which being the amount of the capital stock with which this corporation will start business, are as follows:

S. T. Stewart, Raleigh..... 5
C. N. Freeman, Raleigh..... 9
B. E. Taylor, Raleigh..... 1

46 Sixth. The period of existence of this corporation is limited to sixty years.

Seventh. The board of directors of this corporation shall have the power, by vote of a majority of all the directors, and without the assent or vote of the stockholders, to make, alter, amend, and rescind the by-laws of this corporation.

In testimony whereof, we have hereunto set our hands and affixed our seals, this 13th day of March, 1912.

SHELLUM P. STEWART. [SEAL.]
C. W. FREEMAN. [SEAL.]
B. E. TAYLOR. [SEAL.]

NORTH CAROLINA,
Wake County:

This is to certify that on this 13th day of March, 1912, before me, a notary public, personally appeared C. N. Freeman, B. E. Taylor and S. T. Stewart, who, I am satisfied, are the persons named in and who executed the foregoing certificate of incorporation of "Electrical Engineering and Contracting Company," and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

In testimony whereof I have hereunto set my hand and official seal this 13th day of March, 1912.

[NOTARIAL SEAL.] CAREY K. DURFEY,
Notary Public.

My commission expires Sept. 19, 1912.
Filed March 13, 1912.

J. BRYAN GRIMES,
Secretary of State.

47 No. 10093.

Amendment of Certificate of Incorporation of Carolina Electrical Company.

Resolution of Directors.

The board of directors of the Carolina Electrical Company, a corporation of North Carolina, on the 3rd day of May, 1912, adopted the following resolution:

Resolved, That in the judgment of the board of directors of this company it is advisable to change the certificate of incorporation so as to provide for the issuing of capital stock in the additional amount of $35,000.00, divided into 350 shares of the par value of $100.00 per share, of which $30,000.00 shall be common capital stock consisting of 300 shares of the par value of $100.00 each and $5,000.00 shall be preferred capital stock consisting of fifty shares of the par value of $100.00 each, making the total authorized capital of the company $50,000.00.

Resolved, further, That a special meeting of the stockholders of this company be, and the same is hereby called to meet at the office of the company, in the city of Raleigh, at 10:40 A. M., on the 3rd

day of May, 1912, for the purpose of considering and taking action upon the proposed amendment to the certificate of incorporation, and the secretary is directed to give ten days' notice of said meeting, personally or by mail, to each stockholder of this company, unless said notice is waived by the stockholder.

Certificate of Change.

The Carolina Electrical Company, a corporation of North Carolina, doth hereby certify that pursuant to the foregoing resolution of its board of directors it has this day adopted the following resolution:

Resolved, That it is deemed advisable to change the certificate of incorporation of the Carolina Electrical Company by striking therefrom paragraph four, which prescribes the amount and character of capital stock which the company may issue and by inserting in lieu thereof the following:

48 Fourth. The total amount of the capital stock of this corporation is $50,000.00, and the number of shares into which same is divided is 500, of which said stock $40,000.00, divided into 400 shares of the par value of $100.00 each, shall be general or common stock, and $10,000.00 divided into 100 shares of the par value of $100.00 each, shall be preferred stock. Said preferred stock shall entitle the holder to receive each year out of the net earnings of the company a fixed yearly dividend of seven per centum before any dividends shall be paid upon, or set apart for said general or common stock. Such dividend on the preferred stock shall be cumulative and payable semi-annually on the first day of January and July, respectively in each year. Said preferred stock shall, at the discretion of the company, be subject to redemption at par at the end of three years, or on any dividend date thereafter; provided, however, this corporation may organize and begin business when forty-nine shares ($4,900.00) of the capital stock shall have been subscribed for."

That more than two-thirds in interest of all the stockholders of said company voted in favor of said resolution, and that their written assent to said amendment is hereto annexed.

In witness whereof, said corporation has caused this certificate to be signed in its name by its president and secretary, and its corporate seal to be hereto affixed, the 3rd day of May, 1912.

[CORPORATE SEAL.]

CAROLINA ELECTRICAL COMPANY,
By N. L. WALKER, *President.*

Attest:
C. N. FREEMAN, *Secretary.*

49 Stockholders' Assent to Change.

We, the subscribers, being at least two-thirds in interest of all the stockholders of the Carolina Electrical Company, having, at a meeting regularly called for the purpose, voted in favor of the resolution to amend paragraph four of the certificate of incorporation of said company, providing for an increase of $35,000.00 in the

capital stock, do now, pursuant to the statute hereby give our written assent to said change.

Witness our hands, this the 8th day of May, 1912.

Stockholders.	Number of Shares.
T. B. Crowder	4
N. L. Walker	64
C. N. Freeman	9
E. E. Culbreth	5
James R. Young	6

NORTH CAROLINA,
Wake County:

This is to certify that on this the 9th day of May, 1912, before me personally appeared C. N. Freeman, secretary of the Carolina Electrical Company, the corporation mentioned in and which executed the foregoing certificate, who, being by me duly sworn, on his oath says that he is such secretary, and that the seal affixed to said certificate is the corporate seal of said corporation, the same being well known to him; that N. L. Walker, is president of said corporation, and signed said certificate and affixed said seal thereto, and delivered said certificate by authority of the board of directors and with the assent of at least two-thirds in interest of all the stockholders of said corporation, in the presence of deponent, who thereupon subscribed his name thereto as witness.

And he further says that the assent hereto appended is signed by at least two-thirds in interest of all the stockholders of said corporation.

[NOTARIAL SEAL.] J. W. SMITH,
Notary Public.

Commission expires 21st day of December, 1913.

Filed May 9, 1912.

J. BRYAN GRIMES,
Secretary of State.

50 STATE OF NORTH CAROLINA,
DEPARTMENT OF STATE.
RALEIGH, July 17, 1913.

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (four (4) sheets) to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 17th day of July, in the year of our Lord, 1913.

[OFFICIAL SEAL.] J. BRYAN GRIMES,
Secretary of State.

STATE OF NORTH CAROLINA,
DEPARTMENT OF STATE,
RALEIGH, July 17, 1913.

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (four (4) sheets) to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 17th day of July, in the year of our Lord, 1913.

[OFFICIAL SEAL.] J. BRYAN GRIMES,
Secretary of State.

Aiken, S. C., P. O.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
October 18, 1913.

Pursuant to section 882 of the revised statutes I hereby certify that the annexed papers are true and correct copies of certain
51 letters, etc., or of excerpts therefrom, relating to the contract of Ambrose B. Stannard for the construction of the post-office at Aiken, South Carolina, on file in this department.

In witness whereof, I have hereunto set my hand, and caused the seal of the treasury department to be affixed, on the day and year first above written.

[Seal of Treasury Department.]

BYRON R. NORTON,
Assistant Secretary of the Treasury.

Aiken, S. C., P. O.

Ass't Sec'y Allen. Approves Settlement with Ambrose B. Stannard damages charged. Aiken, S. C.

TREASURY DEPARTMENT,
OFFICE OF SUPERVISING ARCHITECT,
WASHINGTON, August 21, 1912.

The Honorable the Secretary of the Treasury.

SIR: I have the honor to inform you that on July 5, 1910, the department entered into a contract with Ambrose B. Stannard of New York, N. Y., for the construction complete of the U. S. post-office building at Aiken, S. C.

Contract dated, July 5, 1910.

Time to complete, August 1, 1911.

Liquidated damages for delay, $40.00 per diem.

The work was practically completed June 3, 1912, ten months and three days beyond the contract time.

The following is a condensed statement of the account:

Contract, construction complete	$45,618.00
Additions from time to time	569.92
	$46,187.92
Deductions from time to time	261.87
	$45,926.05
Payments on account	41,134.43
Balance due	$4,791.62

52 The chief of the technical division of this office, under date of the 15th instant, certified that all work embraced in this contract had been satisfactorily completed, and that all necessary proposals for additions, deductions, etc., affecting the contract as originally awarded had been received and had appropriate final action.

In view of the foregoing, and of the fact that to charge the contractor with the per diem amount of liquidated damages specified in the contract would be greatly in excess of the actual damages to the government, I have respectfully to recommend that only the actual damages, amounting to $792.61, be charged, and authority given for the issue and payment of a voucher in favor of the contractor for $3,999.01, the balance outstanding under the contract and additions thereto, after making the deductions indicated.

Respectfully,

O. MENDEROTH,
Supervising Architect.

Secretary of the Treasury, Aug. 21, 1912—3—Aiken, S. C.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
August 21, 1912.

Approved, and actual damages charged, as recommended: by direction of the secretary.

SHUMAN ALLEN,
Assistant Secretary.

AIKEN, S. C., August 23, 1912.

The Custodian, Postoffice, Aiken, S. C.

SIR: Referring to contract with Ambrose B. Stannard dated July 5, 1910, for the construction, complete of the U. S. Postoffice building in your custody, I have to advise you that the
53 department, on the 21st instant, charged against the contractor the sum of $792.61, to cover the extra expense resulting to the government on account of 149 days' delay in the completion of said building, and authority has been given for the issue and payment of a voucher in favor of the contractor for $3,999.01, the balance outstanding under the contract and additions thereto, after making the deduction indicated. You are, therefore,

hereby directed to prepare, certify, and issue a voucher in the sum named and forward it to the contractor for signature and reference to the department for payment.

The following is a statement of the account, which should be copied literally upon the face of the voucher:

Contract, Construction, Complete		$45,618.00
Addition, (Pro.), Dec. 28, 1910	$129.92	
" (" 3957), Mar. 4, 1911	440.00	
		569.92
		$46,187.92
Deduction (Pro.), May 10, 1911	$50.00	
" ("), Jan. 12, 1912	12.87	
" (D./L.), May 13, 1912	30.00	
" (Pro.), June 13, 1912	134.00	
" ("), June 21, 1912	10.00	
" ("), July 22, 1912	5.00	
" ("), July 22, 1912	5.00	
" ("), July 22, 1912	15.00	
		261.87
		$45,926.05

Deductions on account of 149 days' delay as follows:

Rent of P. O. quarters at $700 per annum	$289.73	
Salary of Supt., at $1,095 per annum	453.21	
Rent of Supt.'s office at $10.00 per mo	49.67	
		792.61
		$45,133.44
Payments on account		41,134.43
Balance due		$3,999.01

Respectfully,

JAS. W. WETMORE,
Executive Officer.

54 X-File, Sacramento, Cal.

AIKEN, S. C., August 23, 1912.

Mr. Ambrose B. Stannard, U. S. Rubber Company Building, New York City.

SIR: Referring to your contract dated July 5, 1910, for the construction complete of the U. S. postoffice building at Aiken, S. C., I have to advise you that the department, on the 21st instant, charged your account with the sum of $792.61, the actual additional expense resulting to the government by 149 days' delay in the completion of said work, and that authority has this day been given

for the issue and payment of a voucher in your favor for $3,999.01, being the balance outstanding under your contract and additions thereto, after making the deduction indicated.

The extra expense referred to is made up as follows:

Rent of P. O. quarters at $700.00 per annum	$289.73
Salary of Supt., at $1,095.00 per annum	453.21
Rent of office for Supt., at $10.00 per mo	49.67
Total	$792.61

A detailed statement of the account will be shown on the voucher, which the custodian of the building will issue and forward to you for signature. Prompt action will be taken relative to the payment of said voucher upon its receipt by the department.

Final settlement under your contract for the Federal building at Sacramento, Cal., is now receiving consideration.

Respectfully,

JAMES W. WETMORE,
Executive Officer.

55 10878.

TREASURY,
WASHINGTON, D. C., Sept. 11, 1912.

Assistant Treasurer of the United States, New York, N. Y.:

Pay to the order of Ambrose B. Stannard $3,999.01/100 Three Thousand Nine Hundred Ninety-Nine 01/100 Dollars.

Object for which drawn —.

S. R. JACOBS,
Disbursing Clerk,
By Deputy, M. W. RISHARD,
Disbursing Clerk.

ARCH.

Endorsement: Ambrose B. Stannard. Sept. 12, 1912. Received payment through the New York Clearing House. Second National Bank of the city of N. Y. Endorsement guaranteed. Sep. 13, '12. W. M. Pabst, Cashier.

56 Postoffice, Aiken, South Carolina.

The United States to Ambrose B. Stannard, Dr.

NEW YORK, N. Y., Aug. 26, 1912.

Contract, Construction Complete		$45,618.00
Addition, (Pro.), Dec. 28, 1910	$129.92	
" (" 2957), Mch. 4, 1911	440.00	
		569.92
		$46,187.92

Deduction	(Pro.	), May	10, 1911.....	$50.00	
"	("	), Jan.	12, 1912.....	12.87	
"	(D./L.	), May	13, 1912.....	30.00	
"	(Pro.	), June	13, 1912.....	134.00	
"	(Pro.	), June	21, 1912.....	10.00	
"	(Pro.	), July	22, 1912.....	5.00	
"	(Pro.	), July	22, 1912.....	5.00	
"	(Pro.	), July	22, 1912.....	15.00	
					261.87
					$45,926.05

Received. Office Supervising Architect. Aug. 29, 1912.
All proposals not attached to this voucher heretofore sent to auditor. Copy of settlement letter attached.

57 Aiken, South Carolina Postoffice.

The United States to Ambrose B. Stannard, Dr.

NEW YORK, N. Y., Aug. 26, 1912.

Bro-t forward		$45,926.05
Deduction on account of 149 days' delay, as follows:		
Rent of postoffice quarters, @ $700, per a...	$289.73	
Salary of Supt. @ $1,095, per annum.....	453.21	
Rent of Supt. office, @ $10.00 per mo.....	49.67	
		792.61
		$45,133.44
Payments on account		41,134.43
Balance due		$3,999.01

Custodians.—Permit no delay in forwarding discount vouchers, as checks in payment thereof must reach payee before discount day. See also paragraphs 6 and 7 custodians' instructions.
(Certification and bill to be completely filled in by payee, or before signature by payee, without alteration or erasure at any time.)

I certify that the above bill is correct and just and that payment therefor has not been received.
$3,999.01.

AMBROSE B. STANNARD,
Contractor.

(Not to be signed in duplicate.)
(Any notations made in spaces provided therefor on the back of this voucher become a part of this certificate.)

I hereby certify that the above articles have been received by me in good condition, or the service performed as stated; that they were necessary for the public service; that the prices charged are just,

58 reasonable, and in accordance with the agreement, and that they were secured in accordance with sections 1 and A of the methods stated on the reverse hereof.

Approved for $3,999.01.

C. E. CARMAN, *Custodian.*

By order of the Secretary:

JNO. W. PARSONS,

Chief Division of Accounts.

Paid by check No. 10878, dated Sep. 11, 1912, drawn on New York.

Voucher No. —. Treasury Department, Office of Supervising Architect. Appropriation: Post office, Aiken, S. C. Amount $3,999.01 in favor of Ambrose B. Stannard, New York, N. Y. Building. U. S. Post office, Aiken, S. C. For Purchases, and Services other than Personal. Disbursing Clerk, Received Sept. 10, 1912. Treasury Department. X-File, Aiken, S. C. P. O. Ambrose B. Stannard, Contractor, etc. (Notable Contracts). Naming 21 Contracts.

59 Aug. 24, 1912.

Supervising Architect, U. S. Treasury, Washington, D. C.

SIR: I have to acknowledge receipt of your letter of Aug. 20th notifying me that in settlement of my account for construction of P. O. Bldg., Aiken, S. C., has been taken up by the Dep't, and that voucher will be issued—in amount $3,999.01—in full settlement.

I note the statement in your said letter that final settlement, under my contract for extension and remodelling of Federal Bldg., Sacramento, Cal., is now receiving consideration.

I ask that consideration be immediately given final settlement with me for contracts for construction of P. O. Bldg., at Malone, N. Y., and extension and remodelling of Federal Bldg., Bath, Maine—both of these operations being completed and having received final inspection.

Respectfully,

AMBROSE B. STANNARD.

Received Office Supervising Architect, Aug. 26, 1912.

The defendants objected to the introduction of these copies in evidence on the ground that the certificates were not in the form prescribed by section 906 of the revised statutes of the United States, in that it was not certified by either the Governor or Secretary of State, of North Carolina, that the attestation was in due form and by the proper officers.

The court overruled this objection, and admitted the copies in evidence. To this ruling, the defendants excepted.

The plaintiffs offered in evidence, the following documentary evidence, with reference to the final settlement of the contract be-

tween said Ambrose B. Stannard and the United States mentioned in the amended complaint and petitions of intervention:

Photographic and certified copies from the Treasury Department (furnished to this court by said department at the request of the court, made in an order with the consent of counsel for all parties) of the following documents, viz:

60 Letter from supervising architect to the secretary of the treasury, dated August 21, 1912, with an endorsement thereon, of the same date, by the secretary of the treasury.

Letter, dated August 23, 1912, from the supervising architect to the custodian of the building, at Aiken, S. C.

Letter dated August 23, 1912, from the supervising architect to A. B. Stannard.

Letter, dated August 24, 1912, from A. B. Stannard, acknowledging receipt of the last mentioned letter.

Voucher, issued by the custodian of the building, dated August 26, 1912, with certificate thereon signed by said Stannard, and approved Sept. 9, 191[illegible]

Disbursing officer's check, No. 10,878 to the order of A. B. Stannard, dated Sept. 11th, 1912, and endorsements thereon.

The plaintiffs also offered in evidence, a letter dated August 31, 1912, from A. B. Stannard to Carolina Electrical Company, Raleigh, N. C., referring to the issuance of voucher to him, as follows:

Ambrose B. Stannard, Contractor.

Aiken, S. C.
Lexington, N. C.

NEW YORK, Aug. 31, 1912.

Carolina Electrical Company, Raleigh, N. C.

GENTLEMEN: I have to acknowledge receipt of your letter of August 28th and state that final voucher has just reached me for P. O. Bldg., Aiken, S. C., and I have signed and returned it to Washington for check, on receipt of which your account will be settled.

I will look up the Lexington account and see what is due you and send you check for that.

I have the plans and specifications here for the extension of Federal building -- your city, and will look for a proposal from you, for your work in that building, and also for the proposed extension of Pensacola, Fla. building.

Very truly yours,

AMBROSE B. STANNARD.

61 The plaintiffs also offered in evidence, department circular No. 45, 1912: with reference to "Claims for Material or Labor in Federal Building Work," dated September 12, 1912, in which the following statement is made by the department viz:

"Final settlement.

"The department treats as the date of final settlement mentioned

in said acts the date on which the department approves the basis of settlement under such contract recommended by the supervising architect, and orders payment acoerding. (So far as known, the correctness of this view as to the true date of final settlement has not been decided by the courts.)"

The defendant, Ambrose B. Stannard when sworn and examined as a witness, testified that the above mentioned checque issued to his order by said disbursing order was received by him in final payment on September 12, 1912.

The foregoing is all the testimony bearing upon the issue when final settlement was had of the contract between said Stannard and the United States.

The plaintiffs offered in evidence exemplified and certified copies of the summons for relief in an action brought by the Hotpoint Electric Heating Company as plaintiff on behalf of itself and all other creditors of the Southern Electrical Company, in the Superior Court, of the State of North Carolina, against Carolina Electrical Company, and proof of service thereof, the petition in said action, and order appointing Joseph B. Cheshire, Jr., permanent receiver, which order reads as follows:

NORTH CAROLINA,
Wake County:

In the Superior Court, October Term, 1912.

HOTPOINT ELECTRIC HEATING COMPANY, on Behalf of Itself and All Other Creditors of the Carolina Electrical Company,
vs.
CAROLINA ELECTRICAL COMPANY.

This cause coming on to be heard before the court upon the petition herein filed, and it appearing to the court that the Carolina Electrical Company, a North Carolina corporation, is insolvent, or in immediate danger of becoming so, its liabilities exceeding its assets, and it further appearing that after advertisement had been duly made for the creditors, stockholders, etc., of the Carolina
62 Electrical Company to appear and show cause why said receivership should not be made permanent and it further appearing that notice was duly served upon said defendant to show cause why said receivership should not be made permanent, and that upon the day named in said notice no one appeared to object to said receivership being made permanent, now, therefore, it is ordered that Jos. B. Cheshire, Jr., be and he is hereby appointed permanent receiver of the Carolina Electrical Company, and upon execution of a good and sufficient bond by said receiver in a surety company authorized to do business in the State of North Carolina in the sum of $5,000.00 dollars he is hereby authorized and empowered to enter upon the discharge of his duties as such permanent receiver and as such is hereby authorized to take charge of all property of the Carolina Electrical Company whether real, personal, chattels or

otherwise, and he is hereby invested with all the rights and powers as receiver according to law.

And the said Jos. B. Cheshire, Jr., as permanent receiver of the Carolina Electrical Company is hereby authorized to sue for any and all debts and obligations owed to the Carolina Electrical Company, and to collect, hold and distribute to the proper parties their part or prorata part of the assets of said defendant. And the Carolina Electrical Company, its officers, stockholders and others interested therein are hereby restrained from transferring or disposing of its property or in any manner interfering therewith or with the permanent receiver until further orders are made in the premises.

And the said Jos. B. Cheshire, Jr., as permanent receiver is hereby authorized and empowered to publish notice in the Raleigh Daily Times, a newspaper published in Raleigh, North Carolina, at least once a week for four weeks, notifying all creditors of the Carolina Electrical Company to file their claims on or before the 1st day of January, 1913, and all creditors and claimants failing to so prove their claims, within said time are hereby barred from participating in any distribution of the assets of said corporation.

And it is further ordered that the Carolina Electrical Company deliver all moneys, properties, choses in action and all other property now in its control and possession to said Jos. B. Cheshire, Jr., as permanent receiver.

G. S. FERGUSON,
Judge Presiding in Sixth Judicial District.

21st October, 1912.

63 The defendants objected to the introduction of these certified copies in evidence, on the ground that they were copies of only a portion of the record in said action, and appear upon their face to be incomplete, and not a statement of all the proceedings had in said cause, and do not show a complete and final judgement in the cause. This objection was overruled, and exception to the ruling taken by the defendants.

The defendants also objected on the further ground that said copy records showed no authority on the part of said receiver to transfer or assign choses of action belonging to the Carolina Electrical Company so as to authorize an action being brought thereon by the assignee in this court.

This objection was considered by the court in passing upon the merits of the case.

Other testimony and evidence was introduced tending to support other allegations of the complaint, petitions of intervention, and answers, in this cause.

At the close of the testimony and taking of evidence, the defendants asked the court to dismiss the action on the grounds:

1. That the testimony and evidence as to the time of final settlement of the contract between Ambrose B. Stannard and the United States, or its officers showed that such settlement was not had six

months before the time of the commencement of this action, March 6th, 1913.

2. That no cause of action having been stated under the statute in the original complaint, nor until the service and filing of the amended complaint, which was more than one year after the final settlement was actually had, the right of action was barred before the commencement of an action under the statute.

This motion was refused, the court holding that the evidence showed final settlement to have been had more than six months before March 6, 1913; and the second ground to be concluded by the order holding that a cause of action under the statute was sufficiently stated to permit the amendment heretofore allowed.

Thereupon the court made, and filed, the following statement of its findings of fact and conclusions of law in the case:

64 *Findings of Fact and Conclusions of Law.*

(Filed Nov. 10, 1913.)

"In the District Court of the United States for the Eastern District of South Carolina.

THE UNITED STATES to the Use and Benefit of J. A. PEELER and Others
versus
AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

This is an action brought under the act of Congress of August 13, 1894, as amended by the act of February 24, 1905, giving to subcontractors, under certain circumstances, the benefit of a resort to the bond that the United States may take to secure performance by the principal contractor. The defendant, A. B. Stannard, together with the defendant, Illinois Surety Company, executed a bond on the 7th of July, 1910, in accordance with the statute, to secure the performance by A. B. Stannard of the contract entered into by him with the United States for the construction of a postoffice in the city of Aiken, according to the contract to that effect dated the 5th day of July, 1910. The plaintiffs allege themselves to be subcontractors of the defendant, Ambrose B. Stannard. The building was constructed and completed, and on the 21st day of August, 1912, the treasury department on behalf of the United States stated and determined the final balance to be paid A. B. Stannard in full settlement of the amount to be paid him under the contract at the sum of $3,999.01. The adjustment and determination of the department to this effect was communicated to Stannard, who, on August 24th, acknowledged receipt of the notification, and that a voucher would be issued to him in the amount of $3,999.01 in full settlement. On August 26th, a voucher of that date was prepared by the department showing the balance due Stannard to be $3,999.01, to which voucher Stannard appended his signature certifying that the bill for that

amount was correct. There is no separate date placed to his signature, but the date of the voucher is August 26, 1912. The signature is presumably at the same date, and I find as a conclusion of fact that on August 26, 1912, Ambrose B. Stannard accepted the adjustment made and proposed by the government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the government for his work under the contract before mentioned. On the 11th of September thereafter a checque for the sum of $3,999.01 was made out by the disbursing clerk of the treasury department payable to the order of Ambrose B. Stannard, who thereafter collected it. Upon the request of the plaintiff herein, viz: the co-partnership styled the Faith Granite Company, the secretary of the treasury on the 16th day of January, 1913 furnished to the plaintiff a certified copy of the contract and bond, and on the 6th day of March, 1913, thereafter, the present action was instituted by the filing of the summons and complaint herein in the office of the clerk of this court, and by service of summons and complaint on defendant Surety Company. Due advertisement appears to have been made as required by the statute upon the institution of this action, and on the 26th of April, 1913, an intervention was filed by E. J. Erbelding, and on the 27th of June, 1913, another intervention was filed on behalf of the firm of Holley & Dyches. No more interventions appear to have been filed in the cause. A motion was made for leave to amend the complaint herein, and was by order of this court filed October 4, 1913, permitted. The cause now being on docket and having been called for trial has been tried, counsel for all parties concerned having first duly waived in writing a trial by jury.

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Upon consideration of the testimony taken, the first point to be settled is that made on behalf of the defendants that this action should be dismissed or judgment rendered for the defendants, upon the ground that it was prematurely brought. That under the terms of the statute it could not be brought until six months after the final settlement of the contract, and that there was no final settlement of the contract until the 11th day of September, 1912, when by finally accepting the checque issued to him in payment of the balance due, Stannard accepted and acknowledged it to be final settlement, and that action having been commenced on the 6th day of March thereafter was commenced before the expiration of six months from the date of final settlement. In the opinion of the court the words "final settlement" as used in the statute do not mean final payment. The word "settlement" does not necessarily in all cases mean payment. The settlement of a debt may mean the payment of the debt, but settlement of a controversy may mean only the ascertainment of the amount to be paid whether it be ever paid or not. Under the present statute a final settlement may not mean payment. If the contractor should finally fail in his contract and the work be completed by the United States, and the contractor be due under the contract for payment to the United States of the cost of completion, which balance in case of the insolvency of the principal contractor might never be paid, then if final settlement meant payment

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there could be said to have been never any final settlement. I construe the words "final settlement" to mean a final adjustment and determination either by contractual agreement of the parties or by proper judicial proceedings of the final results of the operation under the contract, so as to finally determine the balance or result on whichever side it may be. In the present case I find as a conclusion of fact that that final adjustment and settlement in the meaning contemplated by the statute was had on the 26th of August, 1912, and that the present action therefore was not brought before the expiration of six months from the date of final settlement. Such being the case, and no action having been instituted by the United States upon the bond within the six months permitted by the statute, the present action appears to have been properly instituted within the period permitted by the statute. I find further as a conclusion of fact, based upon the construction of the statute hereinbefore given, that the interventions filed have both been filed subsequent to the expiration of six months before the final settlement, and anterior to the expiration of one year therefrom, and have been properly filed within the period permitted by the statute. This finding of fact and law makes it unnecessary to consider the question whether or not, even if this action had been commenced within six months, the objection would not have been one going only in abatement and not in bar to the action, and also whether if the original proceeding or action instituted by the plaintiff had been filed prematurely that would affect the intervenors who filed their interventions subsequent to the expiration of the six months.

The testimony on behalf of all the parties discloses that there are three separate claims sought to be proven in this case. The first is the claim preferred by the firm known as Faith Granite Company. I find as a conclusion of fact that they have shown that their original contract called for a payment of $3,625.00; that they performed that work, and also furnished additional material and labour under the orders of the defendant, Stannard, to the amount of $204.05,
67 making a total of $3,829.05. From this must be deducted first the sum of $482.25, freight bills paid by the defendant, Stannard, and which under the contract were to have been paid by the Faith Granite Company. In addition to this the testimony discloses that there were certain delays due to the failure of the Faith Granite Company to perform its contract with that reasonable promptness and diligence that I find was entailed upon it by the terms of the contract between the Faith Granite Company and Stannard. I find further that much of that delay was caused by the insufficient preparation of the granite material in that it was not prepared in accordance with the terms of their contract, and that their failure to do so delayed the principal contractor in the execution of his work. The exact extent of this delay it is hard definitely to ascertain from the testimony. The Government Inspector, Flinn, testified that at the minimum it was sixty-five days, and the total delay in the completion of the contract was ten months and three days beyond the contract time. The entire liquidated damages for

the delay of ten months and three days was not enforced by the government, but there was enforced against Stannard by the government a deduction for certain actual expenses incurred by the government estimated as being the expenses for 149 days aggregating $792.61. The most definite figure that can be given in estimating the proportion of the delay due to the Granite Company would be testified to have been caused by it according to the proportion it bears to the entire delay of ten months and three days, which I find to be one fifth. I find that the entire expenses due to this delay under the uncontradicted testimony of Ambrose B. Stannard was $1,502.07, of which one-fifth, or $300.51, I find as a conclusion of fact was occasioned by the Faith Granite Company. Adding to $300.51 the sum of $482.25 for freight bills, makes a total of $782.76, which deducted from the total of $3,829.05 leaves a balance of $3,046.29, which I find the plaintiffs, the Faith Granite Company are entitled to recover in this action from the defendant the Illinois Surety Company herein.

The next claim is that on the part of the intervenor, E. J. Erbelding, who has testified to a contract on which all the work was performed of $3,950.00, on the amount of which he has been paid $1,675.00, leaving a balance of $2,275.00. To that is to be further added the sum of $87.60 for additional labour and material furnished to Stannard upon his order, and to be deducted the
68 sum of $10.00, which was deducted by the government inspector, which would leave a balance of $2,352.60. From this amount the defendant, Stannard claims a deduction by reason of delay also on the part of Erbelding. This delay is denied by Erbelding himself, and his employee, Babbitt, and rests upon the testimony of A. C. Wyckoff, the superintendent employed by Stannard himself. The testimony of Wyckoff does show some delay taken by itself, but is too indefinite for any ascertainment of the amount due to that delay, and taken in connection with positive statements of the witnesses on the other side, I must hold that the performance of his contract without delay having been proven by the preponderance of the testimony, I therefore find that the intervenor, E. J. Erbelding, is entitled to recover the sum of $2,352.60 from the defendant, Illinois Surety Company, in this case. The last intervention is that of Holley & Dyches, who proved the performance of labour by way of hauling and for some material furnished to the amount of $500.71. No charge of delay in testimony is made or proven against them, and I find that the intervenors Holley & Dyches are entitled to recover from the defendants herein the sum of $500.71. The original plaintiff herein has preferred and proved a claim upon behalf of the Carolina Electric Company for the sum of $498.69. No testimony showing that there was any delay on the part of the Carolina Electric Company has been adduced, and I find that there has been proven on behalf of the Carolina Electric Company a good claim against the defendant, A. B. Stannard under its contract for the sum of $498.69. It is objected, however, to this claim that it is not sufficiently proven that the Carolina Electric Company was a corporation under the laws of North Carolina, nor

has it been sufficiently proven that the party purporting to be the receiver of that company had the right to assign it to the Electric Engineering and Contracting Company, to whose incorporation it is likewise objected that it is insufficiently proven. I hold as a conclusion of fact that the certificates introduced under the great seal of the State of North Carolina sufficiently proves the incorporation of those two companies, but I find that the order proven in the cause as the authority for the receiver of the Carolina Electric Company to assign their claim to the Electric Engineering and Contracting Company is not sufficient authority for it. As, however, the statute permits any intervenor to come in without any precise regu-
69 lation of form other than a creditor may file his claim and be made a party hereto, I hold that the proceeding in this case is a sufficient filing of the claim on behalf of the Carolina Electric Company, and that such company is entitled to recover the amount above stated, judgment when awarded to be in the name or for the benefit of the Carolina Electric Company, and to be paid only to such person as may be authorized by law to receive it for them.

The defendant, A. B. Stannard has filed his certificate of discharge in bankruptcy in due form as having been granted by the U. S. District Court for the Southern District of New York. This discharge releasing him from all debts prior to the 10th of May, 1913, in which category all the claims proved herein fall, no judgment under this finding can be entered or enforced against the defendant, A. B. Stannard. Interest upon the claims herein adjudged is recoverable from the date of this order only.

HENRY A. M. SMITH,
U. S. Judge for S. C.

November 10, 1913.

Judgment.

Filed December 8, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

Upon and in accordance with the findings of fact and conclusions of his honor, Henry A. M. Smith, United States judge, made and filed herein bearing date November 10, 1913, it is

Adjudged, That the plaintiffs, J. A. Peeler, L. M. Peeler
70 and P. A. Peeler, partners trading under the firm name of Faith Granite Company, have judgment against the defend-

ant, Illinois Surety Company for the sum of three thousand and forty-six and 29/100 ($3,046.29) dollars, which sum bears interest from November 10, 1913, at the rate of 7% per annum, and in addition thereto twenty-nine and ninety-one hundredths ($29.91) dollars, costs.

That Carolina Electrical Company have judgment against the defendant, Illinois Surety Company for the sum of four hundred and ninety-eight, and 69/100 ($498.69) dollars, with interest thereon from November 10, 1913, at the rate of seven per cent. (7%) per annum, and in addition thereto twenty-nine and 91/100 ($29.91) dollars, costs. Said judgment to be paid only to such person as may be authorized by law to receive it for said Carolina Electrical Company.

That the intervenor, E. J. Erbelding, have judgment against the defendant, Illinois Surety Company for the sum of twenty-three hundred and fifty-two and 60/100 ($2,352.60) dollars, together with interest thereon from November 10, 1913, at the rate of 7% per annum, and in addition thereto twenty-nine and 91/100 ($29.91) dollars, costs.

That the intervenors, B. F. Holley and W. P. Dyches, composing the firm of Holley & Dyches, have judgment against the defendant, Illinois Surety Company for the sum of five hundred and 71/100 ($500.71) dollars, with interest thereon from November 10, 1913, at the rate of 7% per annum, and in addition thereto twenty-nine and 91/100 ($29.91) dollars, costs.

D. W. ROBINSON,
Attorneys for Plaintiffs and for Intervenors.

Signed, sealed, entered and enrolled the 8th day of December, 1913.

EDWARD W. HUTSON, [SEAL.]
C. D. C. U. S. S. C.

The defendants excepted to the foregoing findings of fact and conclusions of law, on the grounds that the court erred:

(*a*) In holding and concluding as matters of law, that the term "final settleem-nt" in the statute in question means a final adjustment and determination, either by contractual agreement of
71 the parties or proper judicial proceedings, of the final results of the operations under the contract so as to finally determine the balance due; and not the final payment by the government in discharge of its liabilities under the contract.

(*b*) In finding and concluding as matter of fact, from the evidence above stated, that the "final settlement" contemplated by the statute was had in this case on the 26th of August, 1912, the date of the voucher prepared by the government, and certified by Stannard as correctly stating the balance due him under the contract; and that said Stannard then accepted the adjustment made and proposed by the government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the government for his work under said contract; and in therefore, finding further and conclud-

ing that this action commenced March 6, 1913, was not brought prematurely or before the expiration of six months from the date of final settlement.

(*c*) In holding and concluding, that it was unnecessary to consider the question whether or not, even if this action had been commenced within the period of six months from the date of final settlement, the objection would not have been one going only in abatement, and not in bar to the action.

(*d*) In not finding as matter of fact, from the undisputed evidence in this case, that the final settlement of the contract between Stannard and the United States was had either on September 9, 1912, when the voucher was approved for payment, as per endorsement stamped thereon, or on September 11, 1912, when the cheque was issued and accepted by Stannard in payment and discharge of the liability of the United States under said contract.

(*e*) In not holding and concluding that the bringing of this action was unauthorized under the statute, on March 6, 1913, when it was commenced, and that it should therefore be dismissed.

(*f*) In holding and concluding that it was unnecessary to decide whether or not, if this action had been prematurely commenced by the plaintiffs within six months from the date of final settlement,
72 that would affect the intervenors who filed their interventions subsequent to the expiration of the six months; and in not holding and concluding that the intervenors in the action took it as they found it, and are in no better position than the original parties thereto.

(*g*) In holding and concluding that the certified copies of the articles of incorporation, or charters, under the hand of the secretary of State of North Carolina, and the great seal of that State, were admissible in evidence, and in failing to exclude the same.

(*h*) In holding and concluding that judgment could be awarded in this action in favor of the Carolina Electrical Company, when that company was not a party to, and had not intervened in this action.

(*i*) In not holding that the rights of the plaintiffs, if any upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court until the service of the amended complaint, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

(*j*) In not holding that the rights of Holley & Dyches, if any upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court in their favor until the service of their amended petition of intervention, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

(*k*) In not holding that the rights of E. J. Erbelding, if any upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court in their favor until the service of their amended petition of intervention which was served more than one year after the date of the final settlement of

the contract between Stannard and the United States. On the same day, October 10, 1913, orders were made and granted by the presiding judge extending the time for formal preparation and presentation to the court and for serving and filing of the bill of exceptions and assignment of errors for thirty days from said date.

73 And, therefore, the defendant, Illinois Surety Company, by its counsel, prays that this bill of exceptions may be allowed, signed, settled and sealed.

W. H. TOWNSEND,
Attorney for Illinois Surety Company, Defendant.

Service of the foregoing bill of exceptions is hereby accepted and acknowledged to have been made upon us this 2nd day of December, 1913; and we have no amendments to propose to the same.

D. W. ROBINSON,
Counsel for Plaintiffs and for Intervenors.

The foregoing bill of exceptions is correct in all respects, and is hereby approved, allowed, signed, settled and sealed, and made a part of the record herein, this 10th day of December, 1913.

HENRY A. M. SMITH,
United States Judge for the District of South Carolina.

74 *Assignment of Errors.*

Filed Dec. 10, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, Intervenor; B. F. Holley and H. P. Dyches, Partners Trading under the Firm-name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Now comes the defendant, Illinois Surety Company, and respectfully represents that it feels aggrieved by the proceedings of the District Court of the United States for the District of South Carolina in the above entitled cause, and, in connection with its petition for writ of error herein, makes the following assignments of error, to-wit:

1. That said court erred in refusing the motion to dismiss the original complaint, together with the original petitions of interven-

tion, served and filed in this action, and in holding and concluding as matter of law:

(*a*) That the limitations in the statute (act of Congress, of February 24th, 1905, 33 Stat. at Large 811, chapter 778, amending act of August 13th, 1894, 28 Stat. at Large 278, chap. 280) as to the time within which the action given by the statute must be brought, so far as the surety on the bond of the original contractor is
75 concerned, were only intended to protect such surety from the inconveniences of being sued in separate harassing actions, and of called to respond for the acts of its principal after the lapse of too deferred a period; and

(*b*) That the conditions that there should have been a completion of the contract and final settlement with the United States, and that the action given by the statute be brought within the six months permitted by the statute, are not essential elements of the original benefit created by the statute, and are no part of the fundamental right of action given by the statute; and

(*c*) That the failure to allege the occurrance of these conditions is not a failure to allege a cause of action under the statute; and

(*d*) That the allegation in the complaint that the plaintiff had made the affidavit required by the statute and procured from the assistant secretary of the Treasury a certified copy of the original contract and bond, was in effect an allegation of the existence of the conditions required by the statute as a prerequisite to the bringing of the action; and

(*e*) That a cause of action under the statute was sufficiently pleaded in the original complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect, by way of amendment; and

(*f*) That the original petition of intervention filed on behalf of E. J. Erbelding alleged a cause of action under the statute on behalf of said intervenor; and

(*g*) That the petition of intervention filed on behalf of Holley & Dyches alleged a cause of action under the statute on behalf of said intervenors.

And that the said court further erred in not holding and concluding as matter of law, that the original complaint stating no cause of action under the statute, there was no action under the statute pending in this court upon the filing of said complaint, and that the petitions of intervention thereafter filed should be dismissed because not filed in an action under the statute pending in said court.

76 2. That said court erred in granting the plaintiffs on October 4th, 1913, leave to amend the original complaint so as to make it more ample and sufficient in all respects by the addition of complete allegations as to the existence of the conditions required by the statute at the time of the commencement of the action, in that no cause of action being alleged in the complaint there was nothing to amend by, and the period limited by the statute with- which the action should be brought had expired at the time such amendment was allowed.

3. That said court erred in granting the intervenors on October 4th, 1913, leave to amend their respective petitions of intervention so as to allege the existence of the prerequisites to the maintenance of the action at the time of its commencement, in that (*a*) no action under the statute was pending at the time of the filing of said petitions, and (*b*) the original petitions of intervention stated no cause of action under the statute, and (*c*) the time within which such action might have been instituted, or petition of intervention filed under the statute, had expired when said order was made granting leave to amend.

4. That the said court erred in admitting in evidence the certified copies of the articles of incorporation, or charters, of the Engineering and Contracting Company and of the Carolina Electrical Company, in that the same were not exemplified as required by section 906 of the Revised Statutes of the United States, there being no certificate by the secretary of state or by the governor of the State of North Carolina that the attestation to said copies was in due form.

5. That the court erred in admitting — evidence the exemplified copy of the record from the Superior Court for Wake county, North Carolina, in the case of the Hot Point Electric Heating Company against Carolina Electrical Company, in that the same was only a partial record in a judicial proceeding and did not show a final judgment.

6. That said court erred in holding and concluding as matter of law that the term "final settlement" in the statute in question means a final adjustment and determination, either by contractual agreement of the parties or proper judicial proceedings, of the final
77 results of the operations under the contract so as to finally determine the balance due; and not the final payment by the government in discharge of its liabilities under the contract.

7. That said court erred in matter of law in finding and concluding from documentary and undisputed evidence in this cause that the final settlement contemplated by the statute was had in this case on the 26th of August, 1912, the date of the voucher prepared by the government, and certified by Stannard as correctly stating the balance due him under the contract; and that said Stannard then accepted the adjustment made and proposed by the government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the government for his work under said contract; and in therefore finding and concluding that this action commenced March 6th, 1913, was not brought prematurely or before the expiration of six months from the date of final settlement.

8. That said court erred in holding and concluding as matter of law that it was unnecessary to consider the question whether or not, even if this action had been commenced within the period of six months from the date of final settlement, the objection would not have been one going only in abatement, and not in bar to the action; and in not holding and concluding that the premature commencement of the action within six months from the date of final settlement would be, and was, a bar to the action under the term of the statute.

9. That said court erred in matter of law in not finding as matter of fact and concluding from the documentary and undisputed evidence in this case that the final settlement of the contract between Stannard and the United States was had either on September 9th, 1912, when the voucher was approved for payment, as per endorsement stamped thereon, or on September 11th, 1912, when the checque was issued and accepted by Stannard in payment and discharge of the liability of the United States under said contract.

10. That said court erred in not holding and concluding under the undisputed evidence in this action that the bringing of this action was unauthorized under the statute *under the statute*, on March 6th, 1913, when it was commenced, and that it should therefore be dismissed.

78 11. That said court erred in holding and concluding that judgment could be awarded in this action to, or for the benefit of, the Carolina Electrical Company, although that company was neither a party to, nor had intervened in, this action.

12. That said court erred in not holding and concluding that the rights of the plaintiffs, if any, upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court until the service of the amended complaint, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

13. That said court erred in holding and concluding that the question whether or not the rights of the plaintiffs, if any, under the bond in question, were barred under the statute on the alleged ground that no cause of action under the statute was stated to the court until the service of the amended complaint, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States, was precluded from consideration upon the hearing of the case on its merits by the ruling of the court in its order permitting the service of the amended complaint.

14. That said court erred in not holding and concluding that the rights of Holley & Dyches, if any, upon the bond in question, were barred under the statute, inasmuch as no cause of action under the statute was stated to the court in their favor until the service of the amended petition of intervention, which was served more than one year after the date of final settlement of the contract between Stannard and the United States.

15. That said court erred in not holding and concluding that the rights of E. J. Erbelding, if any, upon the bond in question, were barred under the statute, inasmuch as no cause of action under the statute was stated to the court in their favor until the service of their amended complaint, which was served more than one year after the settlement of the contract between Stannard and the United States.

79 16. That said court erred in holding and concluding that the right of action given by the statute to subcontractors, laborers and material men was at law rather than in equity.

Wherefore, the said Illinois Surety Company prays that the said judgment of the District Court of the United States for the District of South Carolina be reversed, and the case remanded to that court with instructions to enter a judgment for this defendant therein.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.

Bill of Exceptions of Plaintiffs and Intervenors.

Filed December 10, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

Be it remembered, that on the 10th day of November, 1913, the above entitled cause came on for trial before the above court, a jury trial having been waived by stipulation filed herein, the same was tried by his honor Henry A. M. Smith, presiding judge. The plaintiffs and intervenors appeared, by their attorneys, John L. Rendleman, Pierce Brothers, Croft & Croft and D. W. Robinson, and the defendants, by their counsel, W. H. Townsend, and the following proceedings were had:

The pleadings were read and the evidence taken, and thereupon the court made its order embracing its findings of fact and conclusions of fact and of law, which is fully set forth in the record.

80 1. And in and by said order the court found and concluded as follows: "Interest upon the claims herein adjudged is recoverable from the date of this order only."

To which said ruling of the court counsel for plaintiffs and for intervenors duly excepted, because the undisputed testimony showed, and the court found, that the defendant Stannard received full and final payment under his contract on September 11, 1912, and from said date the plaintiffs and intervenors were entitled to interest on their respective debts and claims against the said Stannard.

And the plaintiffs and intervenors hereby tender their bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same. The record and bill of exceptions as settled on the writ of error applied for by the Illinois Surety Co. being included as a part of this bill of exceptions.

HENRY A. M. SMITH. [L. S.]
U. S. Judge.

December 10th, 1913.

Assignment of Errors.

Filed Dec. 10, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

Comes now the plaintiff Faith Granite Company, Electrical & Contracting Company, assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company, and intervenors, E. J. Erbelding and B. F. Holly and H. P. Dyches, composing the firm of Holly & Dyches, and file the following assignment of errors upon which it will rely upon its presentation of the writ of error in the above entitled cause
81 from the order and rulings made by this honorable court on the 10th day of November, 1913, in the above entitled cause:

1. That the United States District Court in and for the Eastern District of the State of South Carolina, Fourth Circuit erred in its findings and ruling that "interest upon the claims herein adjudged is recoverable from the date of this order only"; because the evidence and findings show that the defendant Stannard, the principal contractor, received full payment under his contract on September 11, 1912, for all work done under the contract sued on herein and from that date he had the use and benefit of the moneys due to plaintiffs and intervenors, as subcontractors, and the said defendant and the surety on his bond, to-wit, the defendant Illinois Surety Company, should have been and were liable to said plaintiffs and said intervenors for interest from said date on their respective debts.

Wherefore, the said plaintiffs and intervenors pray that the judgment of said court be reversed and modified in regard to the said interest and that such direction be given that full force and efficacy may inure to said plaintiffs and intervenors by reason of the matters set up in this complaint in this case.

D. W. ROBINSON,
Attorney for Plaintiffs and Intervenors.

Dec. 2, 1913.

82 *Stipulation as to Making up of Record and Sending up Original Exhibits.*

Filed Dec. 10, 1913.

In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, and B. F. Holley and H. P. Dyches, Partners, Trading under the Firm Name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

It is hereby stipulated between the above named plaintiffs and intervenors, by their attorneys, and the Illinois Surety Company, defendant, by its attorney, that the transcript of the record in the above entitled cause, shall be made up by the clerk of this court, so as to include the bills of exceptions for both plaintiffs and defendants, (which contains so much of the record including the pleadings, notice of motion, and orders filed in the cause, as are relevant to the questions to be reviewed on writ of error) and the assignments of error.

The formal judgment entered in this court in said cause on the — day of November, 1913, need not be included in the transcript and printed record. It being admitted that the same was regularly entered in accordance with the findings and conclusions of the court made November 10th, 1913, and set out in the Bill of Exceptions.

It is further stipulated that this court may make an order directing that in addition to the transcript of record on appeal in this action, the clerk of this court transmit to the clerk of the United
83 States Circuit Court of Appeals at Richmond, Va., the following original papers in this action, to be by him safely kept and returned to this court upon the final determination of this action in said Court of Appeals, namely:

The photographic and certified copies of letters from supervising architect to the Secretary of the Treasury, dated August 21st, 1912, with endorsement thereon by the Secretary of the Treasury; letter from Supervising Architect to Custodian of postoffice building at Aiken, S. C., dated August 23rd, 1912; letter from Supervising Architect to A. B. Stannard, dated August 23rd, 1912; letter from A. B. Stannard, dated August 24th, 1912; voucher issued by custodian of building, dated August 26th, 1912, with certificate by Stannard and other endorsements thereon; disbursing officer's checque, No. 10,878, to the order of A. B. Stannard, dated Sept. 12th, 1912, and endorse-

ments thereon, which copies were furnished by the Treasury department to the judge of this court.

Also, original letter from A. B. Stannard to Carolina Electrical Co., of Raleigh, dated August 31st, 1912, introduced in evidence by plaintiffs.

It is further stipulated that said transcript of record made up by said clerk, be printed in accordance with Rule 23 of said Circuit Court of Appeals.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.
D. W. ROBINSON,
Attorneys for Plaintiffs and Intervenors.

Columbia, S. C., December 2, 1913.

84 *Order to Transmit Record.*

Filed Dec. 10, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding and B. F. Holley and H. P. Dyches, the Last Two Named Being Copartners, Doing Business under the Firm Name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

On motion of W. H. Townsend, attorney for Illinois Surety Company, defendant:

It is ordered, that a transcript of the record and proceedings in the above entitled case be made up by the clerk of this court, together with all things thereunto relating, in accordance with the stipulation signed by the attorneys for the parties and filed herewith, and be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit.

It is further ordered, that in addition to said transcript of the record on appeal in this action, the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals at Richmond, Virginia, the following original papers in said action, to be by him safely kept and returned to this court upon the final determination of this action in said Court of Appeals, namely: The photographs and certified copies of letters from supervising architect to the secre-

tary of the Treasury, dated August 21st, 1912, with endorse-
85 ment thereon by the secretary of the Treasury; letter from supervising architect to custodian of the post-office building at Aiken, S. C., dated August 23rd, 1912; letter from supervising architect to A. B. Stannard, dated August 23rd, 1912; letter from A. B. Stannard, dated August 24th, 1912; voucher issued by custodian of building, dated August 26th, 1912, with certificate by Stannard, and other endorsements thereon; disbursing officer's cheque, No. 10,878, to order of A. B. Stannard, with endorsements thereon; which copies were furnished by the Treasury Department to the judge of this court.

Also, original letter from A. B. Stannard to First National Bank of Salisbury, N. C., dated August 31st, 1912, introduced in evidence by plaintiffs.

HENRY A. M. SMITH,
United States Judge for the District of South Carolina.

December 10, 1913.

Memorandum.

Petition of defendant for writ of error and allowance of writ of error, filed December 10, 1913.

Writ of error, issued and filed December 10, 1913.

Copy of writ of error lodged for adverse party, December 10, 1913.

Supersedeas bond, filed December 10, 1913.

Penalty, $7,500.00.

Obligors: Illinois Surety Company, principal, and Equitable Surety Company, surety.

Conditioned for damages and costs.

Citation filed December 10, 1913.

Service waived December 3, 1913.

Petition of plaintiff and intervenors for writ of error and allowance of writ of error, filed December 10, 1913.

Writ of error, issued and filed January 8, 1914.

Copy of writ of error lodged for adverse party, January 8, 1914.

Appeal bond, dated — December, 1913.

Penalty, $250.00.

Obligors: J. A. Peeler, L. M. Peeler and P. A. Peeler, composing the firm of Faith Granite Company, principal, and United States Fidelity & Guaranty Company, surety.

Conditioned for costs.

Citation filed January 8, 1914.

Service waived December 9, 1913.

86 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of South Carolina:

In the District Court.

I, Richard W. Hutson, clerk of the District Court of the United States for the District of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records and proceedings in the case of United States, to the use and benefit of J. A. Peeler, and others, plaintiffs, against Ambrose B. Stannard and Illinois Surety Company, defendants, and E. J. Erbelding and Holly & Dyches, intervenors, together with the judgment and all papers relating to the same, as stipulated by counsel, and as appears by the record now on file in my office.

Given under my hand and seal of said court, at Charleston, S. C., in the district aforesaid, this 7th day of January, A. D. 1914.

[SEAL OF COURT.] RICHARD W. HUTSON,
C. D. C. U. S., S. C.

87 & 88 On the same day, to-wit: January 9, 1914, the original petition for a writ of error, order allowing writ of error, writ of error, writ of error bond, and citation; and the cross-petition for a writ of error, order allowing cross-writ of error and cross-writ of error, cross-writ of error bond and cross-citation, are certified up to this Court in pursuance of Sec. 7 of Rule 14.

Same day, appearance of W. H. Townsend is entered for the plaintiff in error and cross-defendant in error.

Same day, appearance of D. W. Robinson, John L. Rendleman, Pierce Bros., and L. E. Croft, is entered for the defendants in error and cross-plaintiffs in error.

Stipulation to Place Case at Foot of Docket and Argue at February Term, 1914.

Filed January 9, 1914.

UNITED STATES OF AMERICA:

Circuit Court of Appeals, Fourth Circuit.

UNITED STATES to the Use and Benefit of FAITH GRANITE COMPANY et al.
vs.
AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

89 & 90 It is stipulated by and between the above entitled Plaintiffs and Defendants, that this cause shall be entered upon

the docket of the Circuit Court of Appeals by the Clerk thereof at once, for hearing at the February Term of said Court. There is an appeal (Writ of Error) by Plaintiff and also by Defendant in this cause.

Dec. 26, 1913.

D. W. ROBINSON,
Of Counsel for Plaintiffs and Intervenors.
W. H. TOWNSEND,
Attorney for Defendants.

January 12, 1914, original exhibits (photographic letters, etc.) certified up.

Stipulation as to Filing Briefs.

Filed January 22, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES to the Use and Benefit of J. A. PEELER et al.,
Plaintiffs,
vs.
AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Cross-Appeals.

In the above entitled action, it is agreed by and between counsel for Plaintiffs, Intervenors and Defendant, subject to the approval of the Court:

That the requirement of Rule 24, in regard to the printing and filing of copies of brief for each of the respective parties herein, shall be dispensed with, and that any party to this action may file such brief at any time prior to the call of the case for hearing.

Jan. 14, 1913.

D. W. ROBINSON,
Of Counsel for Plaintiffs and Intervenors.
W. H. TOWNSEND,
Attorney for Defendant, Illinois Surety Company.

91 & 92 Same day, twenty-five copies of the printed record are filed.

March 4, 1914, (February Term 1914), cause came on to be heard before Knapp and Woods, Circuit Judges, and Dayton, District Judge, and is argued by counsel and submitted.

May 6, 1914, (May Term 1914), the Court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed May 6, 1914.

93 United States Circuit Court of Appeals, Fourth Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-Defendant in Error,

versus

UNITED STATES to the Use of J. A. PEELER et al., Trading as Faith Granite Company et al., Defendants in Error and Cross-Plaintiffs in Error.

Cross-writs of Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia.

[Argued March 4, 1914. Decided May 6, 1914.]

Before Knapp and Woods, Circuit Judges, and Dayton, District Judge.

W. H. Townsend for plaintiff in error and cross-defendant in error, and Benjamin E. Pierce and D. W. Robinson (J. L. Rendleman, Pierce Bros., and Croft & Croft on brief) for defendants in error and cross-plaintiffs in error.

KNAPP, *Circuit Judge:*

This suit was commenced on March 4, 1913, under the Act of Congress of August 13, 1894, as amended February 24, 1905,
94 which gives to sub-contractors under certain conditions a right of action upon the bond of a contractor for the erection of a public building. For convenient reference the material parts of this statute are reproduced in the margin.*

* "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials, shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action and shall be, and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or

The defendant contractor and his surety, the plaintiff in error, filed separate answers to the complaint on April 4, 1913. Notice was published as provided by the Act, and two other sub-contractors intervened, one on April 26, and the other on June 27, 1913. On the 22nd of September, 1913, the defendants filed notices of motion, in the nature of a demurrer, to dismiss the complaint, and also the petitions of intervention, on specified grounds which were in effect that neither the complaint nor the petitions stated a cause of action. It was also alleged that the court had no jurisdiction because the right of action is equitable in its nature and the issues cannot be determined in a suit at law. Upon the hearing of these motions the plaintiffs and interveners asked for and received leave to amend. Amended pleas were thereupon filed, to which answers were duly interposed by the defendants. The contractor set up a special defense, which was sustained, that he had been adjudicated a bankrupt and received his discharge. The case was tried by the District Judge,
95 all parties having stipulated in writing to waive a trial by jury and resulted in a judgment against the plaintiff in error, and in favor of the several sub-contractors mentioned, both plaintiffs and interveners. To reverse this judgment the surety company prosecutes this writ of error. The cross-writ alleges error because interest was allowed only from the date of the order directing the judgment.

Apart from some minor issues which will be later considered, the two principal contentions are, first, that the action was prematurely brought and must fail for that reason, and, second, that the trial court erred in allowing the complaint and petitions to be amended. If the first of these contentions is well founded the case is at an end, as the Supreme Court has recently held in United States v. McCord, et al., decided April 6, 1914. The point was directly involved, and the decision unequivocal. Among other things, the court says:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six

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their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later."

months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability became a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself.

* * * * * * *

"The right to intervene is given in the statute when the action is brought by the United States, and the creditors may have their rights adjudicated in such action. And in the case of an action begun by a creditor in accordance with the statute, the right to file a claim is given to creditors. These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the
96 creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit."

In the case at bar the facts relating to the commencement of the action are these: The work required of the contractor appears to have been practically completed some time in June, 1912. The Supervising Architect so reported in a communication to the Secretary of the Treasury, under date of August 21, 1913, which contains "a condensed statement of the account," including contract price, additions and deductions made from time to time, payments on account, and charges of actual damages for delay, and recommends that authority be given "for the issue and payment of a voucher" in favor of the contractor for $3,399.01, the balance found due to him. On the same date this statement and recommendation were approved by the Assistant Secretary of the Treasury. Under date of August 23, the contractor was notified of the amount so stated and determined to be due him, and that authority had been given for a voucher in his favor for the ascertained balance, and he acknowledged the same two days later by letter to the Supervising Architect. The voucher was issued on August 26, and he signed his approval thereof on or about that date. The check in payment was drawn on the 11th of September, and paid on the following day. This check, as will be seen, was issued and paid less than six months before the suit was commenced, and if that be the date of the "completion and final settlement" of the contract, within the meaning of the statute, the action was prematurely brought and cannot be maintained.

But we are clearly of opinion that the final settlement in this case was effected on or before the 26th of August, when the contractor signed the voucher which bears that date, and in which he certified "that the above bill is correct and just and that payment therefor has not been received." Surely, nothing then remained to be settled. Indeed, there is no indication in the record that anything had

been in dispute between the contractor and the Government.
97 There was no disagreement as to the additions to the work for which he was entitled to additional pay, or as to deductions for items not furnished. Under the penalty clause of the contract the Government had the right to make a further and large deduction for delay in completing the work, and the contractor was of course aware that this could be done. The Government, however, was satisfied to charge against this accumulated penalty only such actual expenses as had been occasioned by the delay, and the contractor was presumably well satisfied with what was done in that regard. At any rate, he accepted the basis of settlement proposed without question or demur, and promptly signed the voucher which stated the account in detail on that basis, and contained a certificate that the bill was just and correct. The contract had been performed, the work accepted, the balance ascertained, which the Government admitted he was entitled to receive, and he assented unreservedly to the settlement which the Government offered. If there can be a settlement of a contractor's claim without payment of the balance due him, which we do not at all doubt, there was a complete and final settlement of the contract in question. The circumstance that something over two weeks elapsed before a check was made out for the balance agreed upon does not in the least alter the fact that the settlement was complete when the contractor signed and returned the voucher. In our opinion the learned District Judge was entirely correct in his conclusion that this suit was not brought until more than six months after the final settlement of the contract.

This accords with the construction of the statute by the Treasury Department, as appears from a regulation which reads as follows:

"The department treats as the date of final settlement mentioned in said acts the date on which the department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly."

It is familiar doctrine that the construction given to a statute by officials charged with its administration will be upheld by
98 the courts unless convincing reason to the contrary is found in the language or purpose of the enactment.

New Haven R. R. Co. v. Interstate Commerce Commission, 200 U. S., 361, 401.

We have discovered only two cases under this statute which bear directly upon the point here considered, and both of them give support to the views above expressed.

United States v. Winkler, 162 Fed., 397.
United States v. Bailey, 207 Fed., 782.

In the latter case, District Judge Bourquin, after reciting the steps taken in the adjustment and settlement of contractors' accounts, uses the following language:

"When this is done and not until then, in respect to government contracts performed, there is final settlement thereof, though further time be necessary for mere ministerial acts, to issue and deliver

warrants. In no other wise can there be final settlement of contract obligations of the United States, and this is the final settlement contemplated by the Act February 24, 1905, aforesaid. And from the date of said auditor's settlement and certificate forthwith as the evidence thereof, the limited time within which actions like unto this must be commenced, begins to run."

The other contention above mentioned alleges error in the allowance of amendments to the pleadings after the expiration of a year from the date of the final settlement of the contractor's account. The original complaint did not allege in terms that there had been a completion of the contract and final settlement thereof between the Government and the contractor; nor did it allege when the contract was completed and final settlement had; nor that such completion and final settlement occurred more than six months, and within a year, before the date of the commencement of the suit. Similar omissions or defects appear in the original petitions of intervention.

We are unable to see any substantial reason why the discretionary power of the court to allow amendments could not be exer-
99 cised because the time within which the suit could be begun had then elapsed. The suit was in fact commenced, as we hold, more than six months and less than a year after the final settlement referred to in the statute. At that time a complete cause of action under the act existed in favor of the plaintiffs. By some mistake or inadvertence they failed, as we will assume, to set forth in their complaint all the facts necessary to establish their cause of action, although the omitted facts actually existed. Why should they be deprived of the benefits conferred by this statute, when their action was seasonably brought and the facts entitled them to recover, merely because through some mischance certain of those facts were omitted from their complaint? Why should not the court permit the omissions to be supplied, and upon what sustainable theory can it be said that the court was powerless to grant relief after the time limited for commencing the action had expired? The amended complaint sets up no new cause of action, and alleges no facts which were not in existence when the suit was begun; it merely supplies omissions and corrects defects in the original complaint. If the suit had been prematurely brought, or brought too late, the court would have been without jurisdiction, because under those circumstances the plaintiffs would not be within the conditions of the statute and therefore could not avail themselves of its provisions; and no amendment would be of value in that case because there would be nothing to amend, as the Supreme Court says in the recent case above cited. But this suit was commenced within the period allowed by the act, and the right of recovery depends upon the state of facts which existed at that time. It is elementary that an amendment dates back to the beginning of the suit and is designed to cure defects in the statement of the cause of action then existing, and there is abundant precedent for permitting amendments of that character and for that purpose, to the end that errors or mistakes of pleading may not result in a miscarriage of justice.

In our judgment the amendments in question were properly allowed under the provisions of sections 954 of the Revised Statutes, and the authority of M. K. & T. Ry. v. Wulf, 226 U. S., 576.

The remaining assignments of error do not go to the merits of the controversy and need but a word of mention. Whether
100 the action authorized by the statute in question is an action at law or in equity seems to us of no practical importance in this case, and therefore requires no discussion, because both parties duly waived a trial by jury and thereby in effect requested the court to try the case without a jury. Under those circumstances no reversible error was committed, even if it be assumed that the cause should have been placed on the equity calendar and not on the law calendar.

We agree with the trial court that the incorporation of the Carolina Electric Company and the Electrical Engineering & Contracting Company was sufficiently proved by the certificates received in evidence. There was no dispute as to the fact or amount of the contractor's indebtedness to the former company, and the obligation of the plaintiff in error to pay the same was properly established. The direction to pay the sum found due "to such person as may be authorized by law to receive it" gives adequate protection to the plaintiff in error and appears to be a suitable disposition of the case in that regard.

We are also of opinion that the learned District Judge was right in allowing interest only from the date of the order awarding judgment, because the amounts due the respective sub-contractors were not ascertained and determined until the trial of the action.

For the reasons thus briefly stated the judgment is

Affirmed.

101 & 102 May 9, 1914 (Same Term), The Court made and entered the following judgment, to-wit:

Judgment.

Filed and Entered May 9, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,

vs.

UNITED STATES to Use of J. A. PEELER et al., Trading as Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, E. J. Erbelding, and Holley & Dyches, Defendants in Error and Cross-plaintiffs in Error.

Cross-writs of Error to the District Court of the United States for the Eastern District of South Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed, with costs.

C. A. WOODS,
Circuit Judge.

May 9, 1914.

103 & 104 *Petition for Writ of Error.*

Filed May 20, 1914.

United States Circuit Court of Appeals, 4th Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,

vs.

UNITED STATES to the Use of J. A. PEELER et al., Defendants in Error and Cross-plaintiffs in Error.

Now comes the Illinois Surety Company, the plaintiff in error and cross defendant in error in the above entitled cause, and says that on or about the 6th day of May, 1914, this Court entered an order affirming the judgment of the District Court of the United States for the District of South Carolina against this plaintiff in error, the Illinois Surety Company, in which order and the proceedings

had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff in error, and the jurisdiction of the District Court was founded on a Federal Statute, and therefore, the decision of the Circuit Court of Appeals is not final; the matter in controversy exceeds $1,000 besides costs, all of which will fully and more in detail appear from the record and assignment of errors.

Wherefore the plaintiff in error, the Illinois Surety Company, prays that a writ of error with supersedeas may be allowed in its behalf from the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record and proceedings and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States and that the judgment herein complained of may be reversed.

ILLINOIS SURETY COMPANY,
By W. H. TOWNSEND,
B. E. HINTON,
Attorneys.

105 & 106 *Assignment of Errors.*

Filed May 20, 1914.

United States Circuit Court of Appeals, 4th Circuit.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,
vs.
THE UNITED STATES to the Use of J. A. PEELER et al., Defendants in Error and Cross-plaintiffs in Error.

And now comes the Illinois Surety Company, plaintiff in error and complains that the judgment entered in the above entitled cause on the 6th day of May, 1914 is erroneous and unjust to plaintiff in error.

1st. Because the Court erred in finding and concluding that "final settlement", within the meaning of the Act of Congress of February 24, 1905, 33 Stat. L. 811, amending act of August 13, 1894, 28 Stat. L. 278, was effected on or before August 26, 1912, the date of the voucher prepared by the Government and certified by the contractor as correctly stating the balance due him under the contract, and in therefore finding and concluding that this action commenced March 6, 1913 was not brought prematurely or before the expiration of six months from the date of final settlement.

2nd. Because the said Court erred in holding and concluding, in effect, as matter of law that the term "final settlement" in the statute in question means a final adjustment and determination of the balance due under the contract and not the final payment by the Government in discharge of its liabilities under the contract.

3rd. Because said Court erred in matter of law in not finding as matter of fact and concluding from the documentary and undisputed evidence in the case that the final settlement of the contract within

the meaning of the statute was had either on September 9, 1912 when the voucher was approved for payment as per endorsement stamped thereon or on September 11, 1912 when the check was issued and accepted by the contractor in payment and discharge of the liability of the United States under said contract.

107 & 108 4th. Because said Court erred in holding that a complete cause of action under the act existed in favor of the plaintiffs on March 6, 1913, when the original bill of complaint was filed.

5th. Because said Court erred in not holding and concluding that the bringing of this action was unauthorized under the statute on March 6, 1913, when the original complaint was filed and that it should therefore be dismissed.

6th. Because said Court erred in not holding that the trial Court was without power to allow, after the expiration of the statutory period of one year prescribed for filing suit, amendments to the original complaint and intervening petitions, which bill of complaint had not only been filed before the expiration of six months after the final settlement of the contract, but neither it nor the intervening petitions stated a cause of action in that they did not allege that there had been a completion of the contract and final settlement thereof between the Government and the contractor, nor that such completion and final settlement occurred more than six months and within a year before the date of the commencement of the suit.

7th. Because said Court further erred in not holding and concluding as a matter of law that the original complaint did not state a cause of action under the statute and that there was therefore no action under the statute pending in the Court upon the filing of said complaint, and that the petitions of intervention thereafter filed could not cure the vice in the original suit, and that the bill of complaint and petitions of intervention should have been dismissed.

8th. Because the said Court erred in holding and concluding that judgment could be awarded in this action to or for the benefit of the Carolina Electrical Company although that Company was neither a party to nor had intervened in the action.

9th. Because said Court erred in not holding and concluding that the rights of plaintiffs and the intervenors if any, upon the bond in question were barred under the statute inasmuch as no cause of action under the statute was stated to the court until

109 & 110 the service of the amended complaint which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

10th. The said Court erred in not holding and concluding that the right of action given by the statute to subcontractors, laborers and material men was in equity and not at law and that the trial Court was without jurisdiction to proceed in or try the action at law.

Wherefore the said plaintiff in error, the Illinois Surety Company, prays that the said judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed.

H. W. TOWNSEND,
B. E. HINTON,
Att'ys for Illinois Surety Co., Plaintiff in Error.

Order Allowing Writ of Error.

Filed and Entered May 20, 1914.

United States Circuit Court of Appeals, 4th Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,
vs.
UNITED STATES to the Use of J. A. PEELER et al., Defendants in Error and Cross-plaintiffs in Error.

On this 20th day of May, 1914, comes the Illinois Surety Company, plaintiff in error and cross defendant in error, and presents to the Court its petition, praying for the allowance of a writ of error and also presents an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment and order herein was rendered, duly authenticated may be sent to the Supreme Court of the United States and that such order, and further proceedings may be had as are proper in the premises, and that the judgment of this Court be reversed. And the said defendant also presents to the
111 & 112 Court bond in the sum of Nine Thousand Dollars ($9,000) conditioned according to law, with sufficient security, which bond is hereby accepted and approved by this Court.

And upon consideration thereof the Court doth allow the writ of error to the said plaintiff in error, the Illinois Surety Company, which shall appear as a supersedeas and it is ordered that a transcript of the record and the proceedings in the case aforesaid be transmitted to the Supreme Court of the United States and the same is transmitted accordingly.

J. C. PRITCHARD,
U. S. Circuit Judge.

Writ of Error Bond.

Filed May 20, 1914.

Know all men by these presents, That we, Illinois Surety Company, a corporation, of Illinois, as principal, and Equitable Surety Company, a corporation, as surety, are held and firmly bound unto J. A. Peeler, L. M. Peeler and P. A. Peeler, partners trading as Faith Granite Company; Electrical Engineering and Contracting Company assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company; E. J. Erbelding; B. F. Holley and H. P. Dyches copartners trading as Holley & Dyches, defendants in error in the full and just sum of Nine thousand ($9,000.00) dollars, to be paid to the said defendants in error, their certain attorneys, executors, ad-

ministrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 16th day of May, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of United States Circuit Court of Appeals for the Fourth Circuit in a suit depending in said Court, between the United States to the use of said defendants in error, J. A. Peeler, et al., and the said Illinois Surety Company a judgment was rendered against the said Illinois Surety Company and the said Illinois Surety Company having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the
113 & 114 said defendants in error citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Illinois Surety Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ILLINOIS SURETY COMPANY, [SEAL.]
B. E. GEAMANN, *Att'y in Fact.* [SEAL.]
EQUITABLE SURETY COMPANY, [SEAL.]
By ALBERT W. WILLETT,
Attorney in Fact.

Sealed and delivered in presence of—
BYNUM E. HINTON.

Approved by—
J. C. PRITCHARD,
U. S. Circuit Judge.

115 *Writ of Error.*

Issued May 20, 1914.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals of the 4th Circuit, at Richmond, Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Illinois Surety Company, Plaintiff in error and Cross-Defendant in Error, versus United States, to the use of J. A. Peeler, et al. trading as Faith Granite Company, and Electrical Engineering and Contracting Company, assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company, E. J.

Erbelding, and Holley & Dyches, Defendants in Error and Cross-Plaintiffs in Error, a manifest error hath happened, to the great damage of the said Illinois Surety Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of May, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk of the United States Circuit Court of Appeals, Fourth Circuit.

Allowed by
J. C. PRITCHARD,
U. S. Circuit Judge.

116 [Endorsed:] Service of Writ of Error. Certified copy of this writ of error is lodged in the Clerk's office for adverse parties this 20th day of May, 1914. Henry T. Meloney, Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

117 & 118 *Citation.*

Issued May 20, 1914.

UNITED STATES OF AMERICA, *ss:*

To J. A. Peeler, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company; Electrical Engineering and Contracting Company, E. J. Erbelding, and B. F. Holley and H. P. Dyches, Copartners, Trading under the Name of Holley & Dyches, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Appeals of the 4th Circuit wherein the Illinois Surety Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment ren-

dered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 20th day of May, in the year of our Lord one thousand nine hundred and fourteen.

J. C. PRITCHARD,
U. S. Circuit Judge.

Service of the above writ is hereby acknowledged to have been made upon me at Columbia, S. C., this 22nd day of May, A. D. 1914.

D. W. ROBINSON,
Att'y for J. A. Peeler et al., Def'ts in Error.

119 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 27" day of May, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Endorsed on cover: File No. 24,268. U. S. Circuit Court Appeals, 4th Circuit. Term No. 176. Illinois Surety Company, plaintiff in error, vs. The United States to the use of J. A. Peeler, L. M. Peeler, and P. A. Peeler, partners, trading under the firm-name of Faith Granite Company, et al. Filed June 11th, 1914. File No. 24,268.